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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945.

No. 117

IN THE MATTER OF
PEER MANOR BUILDING CORPORATION,
Debtor.

W. D. WITTER AND JOSEPH WILLENS,
Petitioners.

vs.

G. J. NIKOLAS, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Dated: May 20, 1946.

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PETITION FOR WRIT OF CERTIORARI.

Petitioners W. D. Witter and Joseph Willens jointly and severally petition that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit of March 13, 1945, affirming the decision below approving the petition for involuntary reorganization of the debtor as filed in good faith and appointing a trustee for the estate of the debtor and denying a rehearing.

STATEMENT OF THE MATTER INVOLVED.

Three creditors invoked the jurisdiction of the Bankruptcy Court to obtain a reorganization of the Peer Manor Building Corporation under Chapter X. Their first petition alleged that the debtor was a corporation and after they obtained the approval of the petition, the order was reversed on the ground that the corporation was dissolved more than two years prior to the filing of the petition and that such a corporation was neither a *de facto* nor a *de jure* corporation and could not be reorganized under Chapter X (134 F. (2) 839). Certiorari was denied here (320 U. S. 211). Thereafter, on July 8, 1943, the same creditors filed a second petition (R. 2-10)* alleging that the Peer Manor Building Corporation could be reorganized as an "unincorporated company." The petition alleged that the petitioners "had formulated" a plan under which the property would be acquired for the first mortgage bondholders as there was no equity for the creditors and stockholders. The District Court held that the former adjudication was binding upon it and dismissed the proceedings for want of jurisdiction on September 13, 1943 (R. 64).

In the absence of a restraining order during the pendency of the petition and with no supersedeas during the pendency of the appeal, Witter completed a partial foreclosure in the State Court which was pending two years prior to the filing of the involuntary petition in bankruptcy. He obtained title through the foreclosure proceedings on February 6, 1944, while the bankruptcy proceeding stood as dismissed. Thereafter, petitioner Joseph Willens acquired the title on October 24, 1944 (Tr. 53).

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* The letter "R" refers to the record in Case 8472 (324 U. S. 757 No. 404), which record is part of the record in this case (Tr. 39).

On November 2, 1944, the mandate of the Court of Appeals reversing the dismissal order was filed (Tr. 22). Witter then obtained leave to file an answer contesting the good faith of the petition, which answer was filed on November 20, 1944 (Tr. 5). Without any evidence tending to support the jurisdictional requirements as to "good faith", the District Court approved the petition as filed in good faith (Tr. 22) and referred the matter to a Master in Chancery to hear evidence on the Plan of Reorganization with the understanding that the Court would reconsider the question of good faith upon the coming in of the report on the plan. It entered its order approving the petition as filed in good faith and appointing a trustee on March 13, 1945, (Tr. 22) and on April 10, 1945, Witter appealed (Tr. 31).

During the pendency of the appeal the Master in Chancery rendered his report recommending the vacation of the order approving the proceedings as filed in good faith and the dismissal of the proceedings on the ground that the evidence showed that the "unincorporated company" was nonexistent; further that all of its interest was divested by the completion of the foreclosure proceeding and that title was vested in Joseph Willens prior to the approval of the petition; that he was not made a party to the proceedings; that no reorganization proceedings may be invoked under Chapter X for liquidation purposes, and that at the time of the filing of the petition there was no prospect of rehabilitation of the debtor and there is not now such a prospect (Tr. 45-46). A motion was made in the Court of Appeals to postpone the hearing on the appeal pending the disposition of the hearing on the Master's report which motion was taken under advisement.

The Circuit Court of Appeals refused to postpone the hearing on the appeal pending the disposition of the case

on the Master's report involving the merits, and affirmed the order below. When its attention was called, on rehearing, that certain exhibits were in the record (which it stated in its opinion that due to the nonproduction of such exhibits it had to assume that the order was properly entered on these exhibits and it, therefore, had to affirm the order), it modified its opinion and stated that it examined the exhibits and they substantiate the order. It did not point out, however, how these exhibits tended to substantiate the order or its opinion.

THE QUESTIONS PRESENTED.

The following questions are presented for the consideration of the Court:

1. Whether a petition for corporate reorganization under Chapter X, where liquidation and not a readjustment of the rights of creditors was at the very outset the only possibility, which was assailed as to its good faith by the answer of a creditor, was properly approved as filed in good faith, and whether the opinion affirming the approval is in harmony with the views of this Court as interpreted by other circuits.

2. Whether it was proper to approve an involuntary petition as filed in good faith in the face of the answer contesting the good faith, without requiring the petitioners to prove the specific facts as required in Sections 130, 131 and 146 of Chapter X.

3. Whether an involuntary petition for corporate organization under Chapter X was properly approved as filed in good faith when it appeared that the assets of the debtor were substantially less than the amount due on the first mortgage bond issue and no conceivable plan could be adopted whereby equity owners and other creditors

could participate in the reorganization and there was pending a foreclosure proceeding in the State Court for the benefit of the first mortgage bondholders and in the absence of a showing that this proceeding was inadequate to grant the relief.

4. Whether the Circuit Court of Appeals was warranted in refusing to postpone the hearing on the appeal from the order approving the petition as filed in good faith when the District Court in entering the order referred the Plan of Reorganization to a Master in Chancery and stated that it would reconsider the question of good faith upon the coming in of the report, and when the Master's report recommended the vacation of the order approving the petition as filed in good faith and the dismissal of the proceedings on the ground that the unincorporated company was nonexistent, that its title was divested by foreclosure, and that a stranger to the reorganization proceedings had obtained title who was not a party to the proceedings.

5. Whether a prior foreclosure proceeding which was not restrained by the Bankruptcy Court in a subsequent reorganization proceeding under Chapter X, and which was completed after the dismissal of the reorganization proceedings for want of jurisdiction, while an appeal was pending which did not operate as a supersedeas, extinguished the interest of the debtor so that there was no property to reorganize after the reversal of the dismissal order, as contended by the petitioners, or whether the foreclosure proceeding was void and the title acquired thereunder was of no effect, as held in the instant case.

REASONS FOR THE GRANTING OF THE WRIT.

1. The decision, that upon a contest on the good faith of an involuntary petition for corporate reorganization

under Chapter X, an order approving it was proper when it appeared that the liability on the first mortgage bond issue exceeded the assets and that under no conceivable theory was there anything for creditors or stockholders to participate in the reorganization, is in direct conflict with the decision of other Circuits and with decisions of this Court*.

2. The decision, that in the absence of a restraining order in a Chapter X proceeding which was dismissed for want of jurisdiction and from which dismissal order an appeal was taken without a supersedeas, the State court was without power to complete the foreclosure before the reversal of the dismissal order on appeal, and that an involuntary petition for reorganization was properly approved as filed in good faith when prior to its approval the title of the alleged unincorporated company was divested, is in conflict with the fundamental law of bankruptcy.

3. There is a disagreement between the Second, Third, Fourth and Sixth Circuits and the Seventh Circuit Court of Appeals on the interpretation of the decisions of this Court that a petition for corporate reorganization should not be approved as filed in good faith when it appeared that the assets were less than the first mortgage indebtedness and there is nothing for stockholders and creditors to receive under any conceivable plan**.

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* Fidelity Assurance Association v. Sims, 318 U. S. 608; Marine Harbor Properties v. Manufacturers Trust Co., 317 U. S. 88; In Re: Loewer's Gambrinus Brewery Co., 141 F. (2) 747, 749; Country Life Apartments v. Buckley, 145 F. (2) 935, 938; Patent Cereal v. Flynn, 149 F. (2) 711, 713; Lorraine Castle Apartment Building Co., 149 F. (2) 55.

** Compare Biltmore Apartments Building Trust, 146 F. (2) 81, C.C. A. 7, with St. Charles Hotel Co., 149 F. (2) 645, C.C.A. 3.

4. The approval of the petition as filed in good faith was without evidence, notwithstanding the answer contesting its good faith. The District Court stated that it would reconsider the matter after the Master had rendered his report on the Plan of Reorganization. The Master rendered his report after hearing evidence on the merits and concluded that the unincorporated company was nonexistent; that it was divested of all title and that under the plan no participation could be given to creditors or stockholders. He recommended that the order approving the petition as filed in good faith be vacated and the proceedings be dismissed. His recommendation was also based on the fact that petitioner Joseph Willens, not a party to the proceeding, acquired the title to the premises through the foreclosure sale while no bankruptcy proceeding was pending and the appeal did not operate as a supersedeas. These facts were brought to the attention of the Court of Appeals which was asked to postpone the hearing on the appeal pending the disposition of the case on the Master's report. The Court of Appeals took the matter under advisement but rendered its decision sustaining the order below in disregard of the Master's report. A denial of certiorari would compel petitioner Willens to go through with the proceedings before the District Court on the Master's report and thereafter appeal to the Circuit Court of Appeals followed by another application for a writ of certiorari.* Such a procedure would be burdensome on all parties, and in the interest of justice and expedience, the writ should be issued, so that all questions could be settled and circuity of appeals be avoided.

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* The District Court after the rendition of the opinion stated that while in the absence of the opinion it would have sustained the Master, in the face of the opinion it would be compelled to overrule his report unless certiorari was granted and the opinion was reversed. The hearing on the report was continued until the disposition of this petition.

3. The Circuit Court of Appeals has decided important questions in the field of bankruptcy which, if permitted to stand, will cause much confusion. The questions concerned are of public interest and its decision is in conflict with decisions of other circuits and is based on a misinterpretation of the decisions of this Court. The writ should be issued to clarify the law and to settle the administration and reorganization proceedings under Chapter X.

PRAYER FOR RELIEF.

Wherefore, petitioners, jointly and severally pray that this petition for a writ of certiorari may be granted and that this Court proceed as provided by law and the rules of this Court in such cases, and that upon final hearing, the judgment of the United States Circuit Court of Appeals for the Seventh Circuit be reversed.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION.

Jurisdiction Invoked.

The decision of the Circuit Court of Appeals sustaining the order below was rendered on February 12, 1946. A rehearing was denied on March 9, 1946, and the petition is therefore filed timely and the jurisdiction of this Court is invoked under Judicial Code Section 240 (a), 28 USCA Section 347 (a) as amended by the Act of February 13, 1925.

Opinion Below.

The opinion of the Circuit Court of Appeals appears in this record (Tr. 59-65). The ruling on the rehearing also appears in this record (Tr. 95). The opinion is published (153 F. (2) 802).

A Statement of the Case.

History of the Proceedings: After the adjudication that the Peer Manor Building Corporation was neither a *de jure* nor *de facto* corporation because of its dissolution more than two years prior to the filing of the reorganization proceedings (134 F. (2) 839, certiorari denied 320 U. S. 211), the same creditors filed a second involuntary petition on July 8, 1943, for corporate reorganization on the ground that the alleged corporation was an "unincorporated company" (Tr. 49). The District Court dismissed the proceedings for want of jurisdiction because of the former adjudication. Petitioner Witter completed the foreclosure of the property during the pendency of the appeal from the dismissal order, which appeal did not operate as supersedeas, and without a restraining order. After he obtained title, the dismissal order was reversed (143 F. (2) 764) and he became the owner through a

Commissioner's Deed. Petitioner, Joseph Willens, who was not a party to the proceeding below, became the grantee of the property on October 27, 1944 (Tr. 53) so that the title of the debtor was completely extinguished by the partial foreclosure, subject to the continuing lien of the remainder of the bond issue, when the mandate was filed on November 2, 1944.

Upon the filing of the mandate Witter obtained leave of court to file an answer contesting the good faith of the petition (Tr. 11-12). His answer, filed on November 20, 1944, stated, among other things, that the alleged "unincorporated company" had no property to be reorganized because of the foreclosure, decree, sale and conveyance (Tr. 5-10). On March 13, 1945, the District Court approved the petition as filed in good faith and appointed a trustee (Tr. 22-28) from which order Witter prosecuted an appeal on April 10, 1945 (Tr. 31).

During the pendency of the appeal the petitioning creditors (the respondents) obtained a reference to a Special Master on their Plan of Reorganization. Witter moved to stay the proceedings pending the disposition of his appeal, which stay was opposed by the respondents. The matter was heard by the Special Master, who rendered his report on January 3, 1946 (Tr. 47) finding that the title of the debtor was extinguished by foreclosure and the title was vested in Joseph Willens, who was not a party to the proceedings. The Master recommended the dismissal of the involuntary proceedings (Tr. 56). The hearing on his report was set before the District Court for March 15, 1946 (Tr. 45) and on January 26, 1946, Witter moved to postpone the hearing on the appeal pending the disposition on the merits on the Master's report (Tr. 44). The Circuit Court of Appeals took Witter's motion under advisement upon the oral argument (Tr. 58), and rendered its opinion on February 12, 1946, sus-

taining the order below (Tr. 59-65). Witter filed a petition for rehearing wherein he urged that the Court of Appeals overlooked that the exhibits, which it stated in its opinion were not before it and on which it assumed that they were the basis for order were, in fact, in the record (Tr. 70-76). The Court of Appeals conceded its error but stated that it thereafter examined the exhibits and that they substantiated the finding below (Tr. 95).

The Involuntary Petition: The involuntary petition for reorganization was filed on July 8, 1943 (R. 2).* It alleged that petitioners were creditors of the Peer Manor Building Corporation, an "unincorporated company". Its assets consisted of a six-story apartment building and furniture, fixtures and personal property located therein, and a claim for $20,000.00 against Peer, the former owner, besides cash in the sum of $681.34. Its liabilities consisted of $154,000.00 in first mortgage bonds described in a Trust Deed to Heitman Trust Company as trustee together with defaulted interest since November 28, 1941, current accounts payable, a claim of the Internal Revenue, and unpaid taxes to the State of Illinois. There were then pending in the State court the partial foreclosure of Witter and a complete foreclosure of the Heitman Trust Company. Petitioners alleged that they had formulated a Plan of Reorganization whereby a newly formed corporation would acquire the property and would issue its common stock in exchange for the first mortgage bonds. None of the stockholders and other creditors were to participate in the reorganization as there was no value in assets above the first mortgage bond issue.

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*The petition for reorganization is contained in the transcript in Case No. 8472 which was made a part of this record by reference (Tr. 2, 39). This record is on file in this court (323 U. S. 757 No. 404), and will be referred to by the letter "R". The reference to the printed record in this case is by the letters "Tr."

The Good Faith: The answer of Witter contesting the good faith of the petition (Tr. 5), after denying the allegations of the petition that the Peer Manor Building Corporation was an "unincorporated company", stated that since February 6, 1944, the property described in the petition was not owned by the debtor. Since no restraining order was ever issued in the proceedings while they were pending, and the reorganization proceeding was dismissed by the District Court for want of jurisdiction, he prosecuted to a decree and sale the pending partial foreclosure and acquired the title by a deed of conveyance upon the failure of the debtor to redeem, and the alleged "unincorporated company" was left without any property to be reorganized. The "good faith" was also challenged on the ground there was pending the prior first mortgage foreclosure and that the interest of the bondholders would be best served in that proceeding. Petitioning creditors were seeking to eliminate the interest of the equity owners and all other junior creditors and the proposed plan was to liquidate the debtor for the benefit of the Peer Manor Bondholders only and the court was without jurisdiction to liquidate a debtor in a Chapter X proceeding when all other stockholders and creditors were to be eliminated.

The Hearing: The hearing on the petition and answer was commenced with a statement of counsel for the petitioning creditors that he had prepared a draft order that the petition was filed in good faith (Tr. 11). Witter's attorney urged that the statement that the Court "heard and considered the evidence" was untrue, and (Tr. 11-12) that the court had granted him the right to file an answer on the issue of "good faith" which he filed, and "there was no evidence adduced as to the good faith of the petition", and he asked that the record speak the truth. Counsel for the petitioning creditors

then stated (Tr. 12) that there was evidence prior to the appeal and that Witter's attorney had introduced a certified copy as an exhibit and that the petitioning creditors had introduced two exhibits which were all attached to the respective briefs which were filed with the Court. The Court stated (Tr. 14) that it considered the matter on the briefs and that it would approve the petition as filed in good faith, and if upon the hearing of the plan it developed there was no property to be reorganized then the plan would fail. Witter's counsel objected to such proceedings and made an offer of proof in support of the answer (Tr. 15-16). The court said it would not pass on the offer of proof but would leave the matter to the Special Master to whom it would refer the case on the plan (Tr. 17-18) and that the approval of the petition as filed in good faith would not affect the rights of the parties if it later developed on the merits that there was no feasible plan and that the property could not be reorganized, the good faith would be affected thereby.* Thereupon, the Court approved the petition as filed in good faith by its order of March 13, 1945, and appointed a trustee (Tr. 22), from which order Witter appealed on April 10, 1945.

The Master's Report: The Master in Chancery who heard the evidence on the Plan of Reorganization of the respondents during the pendency of the appeal, over the objection of Witter, found that after the filing of the involuntary petition by the respondents on July 8, 1943, and its dismissal on September 14, 1943 (Tr. 49) the State Court reacquired jurisdiction to complete the par-

* Bearing in mind the decisions that the issue of good faith could not be raised on appeal from the approval of the plan in the absence of an appeal from the approval of the petition, Witter was compelled to appeal from the order approving the petition, notwithstanding the fact that the Court said it would reconsider the matter upon the coming in of the Master's report on the plan.

tial foreclosure which was commenced two years earlier because (Tr. 50) no restraining order was ever issued by the Bankruptcy Court while the bankruptcy proceedings were pending, and after its dismissal no supersedeas was granted on the appeal. Petitioning creditors knew of the pendency of the foreclosure proceedings and did not take any steps to stay the foreclosure in the State Court, and that Court was never advised of the pendency of the appeal. Prior to June 16, 1944, when the opinion reversing the dismissal order was rendered (Tr. 50), Witter obtained title on February 6, 1944 (Tr. 52), and on October 27, 1944, Joseph Willens, who was not a party to the bankruptcy proceedings, became the owner and the Debtor was completely divested of its title to the property (Tr. 53). He also found that the value of the Debtor's property was $197,218.14 and that the debt on the bond issue and accrued interest exceeded it by a "substantial amount" and there was no feasible plan upon which the corporation could be reorganized. He recommended the vacation of the order approving the petition as filed in good faith and the dismissal of the proceedings (Tr. 56).

The Opinion: The Court of Appeals was presented with the Master's report for its consideration in connection with Witter's motion to postpone the argument on the appeal until the disposition on the merits on the Master's report (Tr. 44-57).* It took the matter under consideration and rendered its opinion sustaining the order below. It sustained the order on its misconception that certain exhibits were omitted from the record (Tr. 61) under "well known rules" that reviewing courts "must" as-

* In view of the fact that Witter prosecuted the appeal in order to preserve his right on the issue of good faith and he thereafter received a favorable report on the merits which would make the appeal moot if the Master's report were sustained, he properly moved to postpone the hearing on the appeal until the disposition of the case on the merits of the Master's report.

sume that the omitted exhibits were the evidence on which the order was entered. When it appeared from the petition for rehearing (Tr. 70) that the exhibits were not omitted, the reviewing court, after conceding its error, said (Tr. 95) that it examined the exhibits and that "they substantiate" its decision, and denied the rehearing.

The opinion conceded (Tr. 65) that the filing of the petition did not "automatically" stay the foreclosure, but because Witter was a party to the bankruptcy proceeding he should have anticipated that the dismissal order might be reversed on appeal. While it admitted (Tr. 62) that Witter's foreclosure "was not automatically checked and no restraining order was issued" it affirmed the order on the ground that Witter knew "that the bankruptcy was pending" when he "took title" and that this was (Tr. 63) "an attempted fraud upon the Court". The Court refused to modify its opinion in the face of the petition for rehearing and the Master's report which showed that when Witter took title on February 6, 1944, there was no pending bankruptcy proceeding, as the proceedings then stood dismissed.

Specification of Errors to Be Urged.

1. The Circuit Court of Appeals erred in holding that an involuntary petition for corporate reorganization was properly approved as filed in good faith when it appeared that the property of the debtor was worth less than the first mortgage indebtedness and that all stockholders and creditors were to be eliminated and there was a foreclosure proceeding pending in the State Court and in the absence of a showing that the proceedings were inadequate to grant the relief to the first mortgage bondholders.

2. The Circuit Court of Appeals erred when it held that under Chapter X, in the absence of a restraining order and of a supersedeas on an appeal from the dismissal of the reorganization proceedings, a prior foreclosure proceeding which vested title in the grantee and which extinguished the title of the debtor was void and in holding that the involuntary petition under Chapter X was properly approved as filed in good faith.

3. It was the duty of the Circuit Court of Appeals to postpone the hearing on the appeal pending the disposition of the Master's report who recommended the dismissal of the proceedings on the ground that the alleged unincorporated company was nonexistent, that its title was extinguished, and that a third party was the owner of the property who was not made a party to the bankruptcy proceedings. It abused its discretion when it denied the motion and proceeded to dispose of the case and affirmed the order below, when the order was entered with the understanding that the District Court would reconsider the approval of the petition upon the coming in of the Master's report.

ARGUMENT.

I.

The interest of the alleged unincorporated company was extinguished by the foreclosure which ripened into a deed prior to the approval of the petition as filed in good faith, and the affirmance of the order cannot be reconciled with fundamental law in bankruptcy.

Faced with a record which showed that the interest of the alleged "unincorporated company" was *completely extinguished* by a foreclosure proceeding which was completed *prior* to the approval of the petition as filed in good faith, the opinion, in its attempt to sustain the order, states (Tr. 62) that "the undisturbed custody and administration of the assets have been *lodged in the District Court ever since the filing of the petition* for reorganization long prior to the decree of the State Court". *This assertion has no support in the record, and is contrary to the record.* The District Court was ousted of custody and administration when its appointment of the trustee was reversed by the same Circuit Court of Appeals (134 F. (2) 839). It did *not regain possession,* custody, control or administration *prior* to the time when Witter obtained his title on February 6, 1944. It had *no control,* custody, and administration of the property at the date of the approval of the petition on March 13, 1945, but the possession, control and administration was *under the jurisdiction of the State Court* through its Receiver who was then in possession.

The partial foreclosure of Witter was filed November 29, 1941. A Receiver was appointed on December 1, 1941,

in that proceeding. Thereafter, a complete foreclosure was filed by Heitman Trust Company on December 29, 1941 (Tr. 48). The receivership in the partial foreclosure was extended to the complete foreclosure (Tr. 53). The District Court placed its trustee in possession on June 17, 1942,* thereafter and he was only in possession from that date until he was ousted on September 21, 1943, upon the reversal of the order of his appointment (134 F. (2) 839). Upon the dismissal of the proceedings in 1943 the Heitman Trust Company which foreclosed under the first mortgage, and which had the receivership of the partial foreclosure extended to the first mortgage foreclosure was placed in possession** and remained in possession from Sept. 21, 1943, until March 13, 1945, when the involuntary petition was approved, and a trustee appointed by the order appealed from. The District Court *did not disturb the possession* of the State Court prior to March 13, 1945, when it approved the petition as filed in good faith. *The State Court* and *not* the Federal Court *was in custody, control and administration of the property* from December 1, 1941 to June 17, 1942, and from September 21, 1943 to March 13, 1945, when the District Court approved the petition and appointed its trustee. **The whole foundation of the opinion is therefore without any support in the record.***** The basic error of the court was pointed out in the petition for rehearing (Tr. 77). Not only was it pointed out that the facts appeared in the Master's report which was presented to it but that these

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* See R. 8475, p. 55, 323 U. S. 757, Nos. 405-406.

** See same record p. 15.

*** In view of the fact that the District Court was only in possession for the short period commencing June 17, 1942 to September 21, 1943 and which possession was without jurisdiction (134 F. (2) 839) and that the State Court was in possession from December 1, 1941, except for the short period, and continued to be in possession at the date of the approval on March 13, 1945, the statement in the opinion as to the "undisturbed" possession of the District Court indicates a complete misconception of the facts.

facts appeared from its own records and the exhibits, which it stated were not in the record, were shown to it that they were in the record (Tr. 61). On rehearing, the Circuit Court of Appeals *conceded its error* that the exhibits were before it and stated that it examined the exhibits but that they substantiated fully its conclusions. How these exhibits sustained its statement was not revealed by the opinion. All of these exhibits are before this Court and the particular exhibit showing that the State Court was in the control, custody and administration of the property appears in the record filed in this Court (R. 8098, pp. 44-45, ¶ 12) which is the record where certiorari was denied (320 U. S. 211) from the decision of the same Circuit (134 F. (2) 839), and the record in case No. 8475 *supra*. The Circuit Court of Appeals should not have closed its eyes to its own records and to the Master's report which *specifically found that the State Court was in control* and administration of the property and *not* the Federal Court and its opinion should have spoken the truth (Tr. 52-53).

(a) In the absence of a restraining order during the pendency of the reorganization proceedings and of a supersedeas during the pendency of an appeal from the dismissal of the proceedings for want of jurisdiction, the State Court properly completed the foreclosure proceedings.

The opinion *concedes* (Tr. 62) that the partial foreclosure was pending and "was not automatically checked and no restraining order was issued". It sustained the order approving the petition on the ground that Witter "was an active participant in the reorganization" who opposed it and, therefore, "knew full well" what was transpiring in the Federal Court. Conceding this to be true, what was the effect of his knowledge? He knew

that on September 13, 1943, there was no restraining order to restrain his foreclosure and that on that day the proceedings stood as dismissed on the ground that the District Court was without jurisdiction to reorganize the alleged corporation. He knew that the District Court found (R. 63-64):

> "1. The question of jurisdiction herein involved is the same question as was involved in the proceeding entitled, Peer Manor Building Corporation, a corporation, Debtor, in the United States Circuit Court of Appeals, for the Seventh Circuit, Case No. 8098.
>
> "2. The evidence does not show that there is here an association, individuals, or corporation, as are required for parties against whom an involuntary petition may be filed under the Bankruptcy Act."

He knew that the District Court concluded (R. 64):

> "1. That the issues herein involved are *res judicata* by the judgment of the United States Circuit Court of Appeals, for the Seventh Circuit, entered in the aforesaid cause in that court, numbered 8098.
>
> "2. That this Court is without jurisdiction to entertain the aforesaid petition filed herein by G. J. Nikolas, *et al.*"

He also knew that it entered an order dismissing the proceedings (R. 65) and that an appeal was prosecuted but that *no supersedeas was granted.* With knowledge of these facts, and *prior* to the reversal of the dismissal order he "took title" to the property on February 6, 1944, after the alleged unincorporated company *failed to redeem* from the foreclosure sale.

The statement in the opinion (Tr. 63) that when Witter "took title" he *knew* that bankrupcy was *pending* runs *counter* to the record. He "took title" February 6, 1944, more than four months before the approval of

the petition as filed in good faith on March 13, 1945 (Tr. 52; ¶ 34); on the day when he took title *there was no pending* bankruptcy proceeding. These proceedings *stood dismissed* and the appeal, *without a supersedeas,* did not convert the *dismissal* proceedings into *pending* proceedings. In view of such a situation, it is impossible to understand the statement in the opinion (Tr. 63):

> "When appellant later procured partial title, he knew he was *impinging upon and attempting to defeat the jurisdiction* already vested in the bankruptcy court by virtue of the constitution and the Act of Congress. He was fully warned that he could not do this. His persistence was an idle, fruitless attempt to defeat the District Court's jurisdiction and, indeed, *an attempted fraud upon the Court.*" (Emphasis ours.)

How was Witter "impinging upon and attempting to defeat the jurisdiction already vested in the Bankruptcy Court", and how was his persistence to complete the foreclosure "an attempted fraud upon the Court"? The only order that was then in force was *the order* of the District Court itself *that it was without jurisdiction* of the bankruptcy proceedings. **How can the act of a party who proceeds with a State Court proceeding in reliance on the order of the District Court that it was without jurisdiction tend to defeat the jurisdiction and to defraud it?** This question was asked of the Circuit Court of Appeals in the petition for rehearing (Tr. 78). The Court replied (Tr. 95) that the petition for rehearing, except as to the reference to the exhibits, was "only reargument." The question was *unanswerable.*

(b) The court failed to notice the distinction between ordinary bankruptcy and proceedings under Chapter X and its decision is not only not in accord with the views of other circuits, but also with its own view in other cases.

The opinion relies (Tr. 63) on *May* v. *Henderson*, 268 U.S. 11, on the point that the "filing of the petition is a *caveat* to all the world". No one disputes that law but here the petition was *dismissed*, and Witter *knew* that it was dismissed for want of jurisdiction. The filing of the petition, therefore, was of no consequence*.

The opinion quotes from *Gross* v. *Irving Trust Co.*, 289 U. S. 342, that upon adjudication title vests in the trustee as of the date of the filing of the petition in bankruptcy, and it cites *Isaacs* v. *Hobbs*, 282 U. S. 734, on the point that jurisdiction of the Bankruptcy Court is exclusive and paramount. It failed to notice *its own decision* distinguishing these cases which apply to the *ordinary* bankruptcy and *not* to reorganization proceedings under Chapter X as distinguished in *the Matter of Ella Tinkoff*, 141 Fed. (2d) 731, where the same Circuit Court of Appeals said (p. 732):

> "**Since there was no effective stay order in force** prior to our order of March 6, 1936, **and since the Bankruptcy Act did not automatically stay such proceedings, we look to prior decisions to learn whether the appellants have any support for their contention that the filing of the petition in bankruptcy by its own force made void all proceedings in the State court.** They rely upon *Isaacs* v. *Hobbs*, 282 U. S. 734, 51 S. Ct. 270, 75 L. Ed. 645. In that case, the State foreclosure proceedings were begun **after** the

* If the filing of a petition is "a caveat to all the world", then the dismissal of the petition is equally a "caveat" to all the world. Not only was the dismissal constructive notice, but Witter who was a party to the proceedings knew that there was no bankruptcy proceeding pending.

bankruptcy proceedings had been instituted and after the bankruptcy trustee had thereby acquired constructive possession of the land. In the case at bar, the bankruptcy petition **followed** the commencement of the foreclosure proceedings in the State court.

The mortgages foreclosed in the State court were not vulnerable under the Bankruptcy Act. The State court was in possession of the property and was foreclosing valid mortgages when the petition in bankruptcy was filed. The filing of such petition in and of itself did not oust or affect the jurisdiction of the State court to proceed to final disposition." (Emphasis ours.)

This distinction applies with equal force here.

(c) The opinion failed to notice the distinction between a foreclosure completed in the absence of a supersedeas and the case where the appeal operated as a supersedeas as distinguished by this court in the cases which it cited.

The opinion says that *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.,* 300 U. S. 131, is "strikingly pertinent." The opinion of this Court in *Union Joint Stock Land Bank of Detroit* v. *Byerly,* 310 U. S. 1 *distinguishing* the *Wayne* case was called to its attention in Petitioner's Reply Brief and is mentioned in its opinion. In distinguishing the *Wayne* case this Court pointed out that while the State Court's jurisdiction was superseded by the Bankruptcy Act, the jurisdiction of the State Court "again attached" upon *dismissal* of the bankruptcy case and it, therefore, had the right to proceed with the "foreclosure suit" and the State Court's procedure *"was as if no bankruptcy case had ever existed."* This Court also *distinguished* the *Wayne* case on the ground that there the appeal operated as a *supersedeas* while in the latter case *no supersedeas was granted.* The dissenting

opinion in the *Union Land Bank* case was based on the point that:

> "Paralleling the situation in the *Wayne* case, not only was the mortgagee-purchaser here a party to the 75 proceeding, but the State Court itself may be said to have acted with knowledge that the dismissal —of which it was notified—did not necessarily represent the last step in the Federal Court proceeding."

The majority of this Court was not persuaded by this argument. The fact that Witter was a party to the Chapter X proceedings did not affect the State Court proceedings*. Witter did not obtain his title under the order from which the appeal was taken as to have a binding effect on him even in the absence of a supersedeas, but *he acquired his title in an independent suit which was not restrained and after the dismissal of the bankruptcy proceedings,* which order was in effect when no supersedeas was obtained.

The *Wayne* case is also distinguishable on another ground. There, the proceeding was under Section 77B, and no restraining order could have been issued prior to the approval of the petition. When the court failed to approve the petition, *the Debtor was helpless.* If the petition was approved it would have either operated as a restraining order according to appellee's contention, or a restraining order would have been issued. It, therefore, prosecuted and obtained a *supersedeas.* This operated as *if the Debtor had obtained the approval and had obtained the restraining order.* When the creditors decided to complete the foreclosure *in the face of the supersedeas,* which the State Court granted with "full knowledge" of the fact, *they acted at their peril.* The reversal of the order

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* In the Union Bank case the "mortgagee-purchaser" was likewise a party. Here, the property was thereafter acquired by petitioner Willens, a complete stranger to the proceedings.

of dismissal with directions to approve the petition as filed in "good faith" operated as if the petition was approved *before the foreclosure was completed.*

Here, the respondents *could have applied and obtained a restraining order prior to the approval of the petition* under Section 113, and *they failed* to avail themselves of such right. The proceeding was dismissed and the appeal *did not operate as a supersedeas.* The State Court *had no knowledge of the facts.* The reversal on appeal did *not* direct the approval of this petition as filed in good faith and only involved the *jurisdictional* question and the plea of *res adjudicata.* The foreclosure was completed *before the approval* of the petition and when the petition was approved, *the title of the Debtor was completely destroyed.*

That it was not the intention of Congress to automatically put an end to pending state court foreclosure suits through the mere filing of a petition for reorganization is apparent from the decision in the case of *Marine Harbor Properties* v. *Mfg. Tr. Co.,* 317 U. S. 78.

A well reasoned case showing the application of the rule is that of *Hoehn* v. *McIntosh,* 110 Fed. (2d) 199. There, the trustee, in a Chapter X proceeding, secured an order for the sale of the real estate in which the debtor had an equity. A state foreclosure suit had been commenced before the petition was filed, but process had not been served upon the bankrupt. The action of the trustee in selling the real estate was *reversed.* In referring to the exclusive jurisdiction of a court of Bankruptcy and in holding *that it was not applicable under Chapter X to a pending foreclosure case,* the court said:

> *"However, this rule does not apply to the enforcement of liens not invalidated or voided by the Bankruptcy Act for the enforcement of foreclosure for*

> *which proceedings in the State Court have been instituted prior to the commencement of proceedings in Bankruptcy either* within or before the four month period where the State Court has first acquired actual or constructive possession of the property. *Straton* v. *New*, 283 U. S. 318; *Davis* v. *Friedlander*, 104 U. S. 570. *In order for the Bankruptcy court to draw to itself the administration of mortgage property as to which at the time of bankruptcy a foreclosure suit was pending, it is necessary for the trustee to establish* (1) *that the mortgaged property was in the possession of the bankrupt at the time of the filing of the petition and not in the possession of the State Court in which the foreclosure suit was pending*, and (2) *that there was an equity in the mortgaged property for the bankrupt estate.*" (Italics ours).*

The state court foreclosure proceeding begun by Witter had been pending **since** 1941. **The petition was filed in July 1943, and before its approval, a sale was held and a deed was issued.**

Since the mere filing of the petition under Chapter X did not operate as an automatic stay of the foreclosure suit, there was nothing left to reorganize and the approval of the petition as filed in good faith was improperly sustained.

In the instant case, *the appeal did not operate as a supersedeas.* The dismissal of the case *without a supersedeas* left the case *as if no bankruptcy proceedings was pending,* and the State Court was within its right to complete the foreclosure, the same as in the *Union Land Bank* case.

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* This case was cited with approval in Muffler v. Petticrew Real Estate Co., 132 F. (2) 479, 481, where the court reversed an order in bankruptcy which restrained a foreclosure commenced four months prior to the filing of the bankruptcy proceeding.

In the Petition for Rehearing, Witters quoted from the *Union* case (310 U. S. 1, 8) the following:

> "The case is analogous to one wherein a state court foreclosure proceeding has been completed and deed delivered to the sheriff's vendee prior to the filing of a petition under Section 75. The provision for the reinstatement, upon the debtor's motion, of a proceeding theretofore dismissed and finally terminated, *cannot affect the jurisdiction of the court conducting the foreclosure proceeding when no bankruptcy cause was pending.*" (Emphasis ours.)

The petition pointed out that in commenting on *Wayne* case on which the Court of Appeals relied, the court pointed out (p. 9) that in the *Wayne* case, after the dismissal of the proceedings and before proceeding with the foreclosure, notice was given of the appearance for a rehearing, and after granting the rehearing and the subsequent dismissal *"the debtor appealed * * * and was granted a supersedeas"*. There, the State Court had *"full notice of all of these facts"* and that the appeal *operated as a supersedeas,* and in spite of that, it proceeded with the foreclosure. This court said (p. 10):

> "We held that, *in the circumstances,* no rights were acquired under the state court proceedings since termination of the bankruptcy case did not occur until final disposition of the efforts in the District Court and on appeal to reverse the decree of dismissal."

This was more strikingly brought out by the Master in Chancery (Tr. 50, ¶ 17) that the respondent had knowledge of the pendency of the partial foreclosure and (¶ 18) that the Superior Court "was never informed and advised" of the pendency of the bankruptcy proceedings. The Master pointed out (Tr. 55, ¶ 5) that the provision in Chapter X for a "Stay order" prior to approval "clearly implies that in the event the debtor fails to avail itself of

such right, then it must abide the consequences of such failure or neglect". The Master stated that to hold otherwise "would be to reward or place a premium" for "failure or neglect" to assert a right. This argument is irresistible and the Court of Appeals clearly erred in completely ignoring his report.

II.

The decision in the instant case that on a contest at the outset on the good faith of the involuntary petition under Chapter X an order that it was filed in good faith was proper when it appeared that the property was valued less than the first mortgage bond issue and that there was nothing for creditors and stockholders, is in direct conflict with the decisions of the Second and Third Circuits and with the decisions of this Court.

The decision in the instant case runs counter to the decision of this court as interpreted by the Second, Third and Sixth as well as by the Seventh Circuit in an earlier case.

(a) The decision that a petition which alleged that the debtor's property should be liquidated for one class of secured creditors under Chapter X is filed in good faith when contested at the outset, is in conflict with the decision of this court as construed by other circuits.

The question whether under Chapter X involuntary proceedings to reorganize a corporation may be invoked by secured creditors when the property is valued less than the secured debt and creditors or stockholders are not to participate in the reorganization was decided by this Court in two decisions. *Marine Harbor Properties* v. *Mfs. Trust Co.*, 317 U. S. 78; *Fidelity Assurance Assn.*

v. *Sims,* 318 U. S. 608. There is a disagreement between the Third and Seventh Circuits as to the interpretation of these decisions, and there is no harmony in the decisions of the Seventh Circuit.

The question first arose in the Seventh Circuit in re: *Biltmore Grand Apartment Building Trust* (146 F. (2) 81), where in affirming the decision below (59 F. Supp. 1000) it did *not concede* that under the decisions of this Court an involuntary petition to reorganize a corporation when there were no assets above the first mortgage liability and nothing for creditors and stockholders was not filed in good faith.* It based its affirmance on a *different* ground. It arrived at the same conclusion in the instant case where it was conceded that *under no conceivable theory* was there anything available for creditore or stockholders and there was a pending foreclosure for the benefit of the first mortgage bond holders and no showing was made that the proper relief could not be afforded in the State Court. The opposite view was taken by the Third Circuit when it *adopted* the decision below (*re: St. Charles Hotel Co.,* 149 F. (2) 645) stating that the decision of the trial court (60 F. Supp. 322) was an *"excellent"* decision and it adopted that decision in lieu of its own. Certiorari was denied by this Court (66 S. Ct. 48). There, the District Court originally approved the petition under Chapter X as filed in good faith and upon a motion to show cause why the order should not be vacated on the ground that it was

* The same judge who wrote the opinion in the instant case on behalf of the Seventh Circuit overlooked his own opinion in Lorraine Castle Apartment Building Corporation, 149 F. (2) 55, where he construed the decision of this court on the point that where such a petition was contested at the outset and not after its approval, that it must be dismissed on appeal for want of good faith. Here, the contest was at the "outset" and the appeal was taken from the approval order.

unreasonable to expect that a Plan of Reorganization can be effected under the provisions of that Act, the Court vacated the order and dismissed the proceedings. It pointed out (p. 325) that Section 146 of Chapter X defined the term of "good faith" by showing that in a prior proceeding the interest of creditors and stockholders could not be best served except in the reorganization proceeding and it referred to the "most recent complete expression" of this Court in *Marine Harbor Properties* v. *Manufacturers' Trust Co.*, 317 U. S. 78, where the property sought to be reorganized was worth less than the first mortgage debt and this Court there held "that the debtor petitioning under Chaper X had not sustained the burden which was upon it to show that the interests of the creditors and stockholders would best be subserved in the Chapter X proceeding where there was a prior State foreclosure proceeding pending." The District Court pointed out that when the answer contesting the good faith of the petition was filed it became "the burden of such petitioner to demonstrate that his petition is filed in good faith." In disposing of the contention there made that it was proper to file a petition which sought to reorganize the property for the benefit of only *one* class, the secured creditors, and in holding adversely to that decision the Court said (p. 328):

> "It was contended in the *Marine Properties* case, as it is contended by the Securities and Exchange Commission in this case, that there are numerous safeguards contained in Chapter X that are lacking in the state court proceedings. In that case the Schackno Act of New York, N. Y. Laws 1933, c. 745, Unconsol. Laws N. Y. § 4871 *et seq.*, was involved, whereas we are concerned with proceedings authorized under the New Jersey law in insolvency, receivership and reorganization. Title 14, Chapter 14, Revised Statutes of New Jersey of 1937, N.J.S.A. 14:14.

We need not examine the differences between the two procedures, for the Supreme Court fully answers this contention as follows: 'Those considerations would be highly relevant and persuasive if this was a case of the usual reorganization proceeding dealing with more than one class of securities under the older procedures which Ch. X was designed to improve and supplant * * *. Then the safeguards afforded by Ch. X would have special significance in protecting the respective classes of investors against improvident, unfair or inequitable adjustments, compromises, and settlements—steps which are basic to the reorganization process but which in selfish hands led to much abuse.

The Court further said:

"In the language of the Supreme Court: 'In view of the burden on a petitioner to make the showing required by § 130 (7) and § 146 (4), the bankruptcy court is not warranted in assuming without more than a state foreclosure proceeding instituted for and on behalf of the first mortgage creditors exclusively is inadequate, measured by Ch. X standards, to protect their interests. The contrary course would result in Ch. X making greater inroads on prior proceedings than § 130(7) and § 146(4) indicate was the purpose.' *Marine Harbor Properties* v. *Manufacturer's Trust Co.*, 317 U. S. 78, at page 88, 63 S. Ct. 93, at page 98, 87 L. Ed. 64.

In fact, it appears from the record that if a plan of reorganization is effected it could consist of no more than an equivalent to a foreclosure of the rights of all creditors and stockholders other than the first mortgage bondholders. Whether the corporation be liquidated and the lienors paid off, whether foreclosure proceedings be taken and the property sold to the lienors, or whether the first mortgagees convert their bonds into stock as evidence of their ownership, the effect and net result would be the same—the first mortgage bondholders alone may partici-

pate in the proceedings and determine the ultimate form of their holdings."

It held that that petition was improperly approved as filed in good faith and vacated the previous order and cited (p. 329) *Fidelity Insurance Association* v. *Sims,* 318 U. S. 608. This decision which was adopted by the Third Circuit as its own decision is *diametrically opposed to the decision of the Seventh Circuit* in the instant case.

The decision of the Seventh Circuit in its interpretation of the decision of this Court in the *Fidelity* case is also in *conflict* with the views of the Second Circuit. (*In Re Loewer's Gambrinus Brewery Co.,* 141 F. (2) 747, where the court said (p. 749):

> "Our decision in *Frank* v. *Drinc-O-Matic,* 136 F. 2d 906, is authority for the order of sale appealed from unless the opinion of Justice Roberts in *Fidelity Assurance Ass'n* v. *Sims,* 318 U. S. 608, 63 S. Ct. 807, 87 L. Ed. 498, stands in the way. But that opinion would not seem to have any bearing on the situation here. It merely states that a *petition for reorganization where liquidation,* and not a readjustment of the rights of creditors, *was at the very outset* the only possibility, *should be dismissed,* as not filed in good faith. The petition was attacked at the outset on the ground that it was not filed in good faith and the Supreme Court held that to institute a proceeding under Chapter X in case where there was no chance of reorganiaztion was a violation of the statute. The Supreme Court said (318 U. S. at page 622, 63 S. Ct. at page 814):
>
> 'Congress did not intend a Chapter X case to be turned into a liquidation proceeding at the outset, but intended the litigation to become a straight bankruptcy only after the failure to consummate a plan, and meant to limit the parties to their remedy in ordinary bankruptcy in all other cases.' "

This was restated in *Country Life Apartments* v. *Buckley,* 145 F. (2) 935, where the Court said (p. 938):

> "Appellants also contend that the trustee's plan could not be confirmed in reorganization proceedings, because it was in reality not a plan of reorganization, but only a means of effecting the complete liquidation of the debtor's property, within the condemnation of *Fidelity Assurance Ass'n* v. *Sims,* 318 U. S. 608, 63 S. Ct. 807, 87 L. Ed. 1032. *That case, however, held merely that a petition is not filed in good faith where liquidation, and not a readjustment of the rights of creditors, was at the very outset the only outcome to be expected.* There the petition was attacked for lack of good faith in the initial stages of the proceedings, and the Court held that a proceeding could not be instituted under Chapter X where there was no chance of reorganization."

There views were repeated in *Patent Cereals* v. *Flynn,* 149 F. (2) 711, 713, where the Court said:

> "Finally, we cannot take the view of the District Judge that the opinion of Justice Roberts in *Fidelity Assurance Ass'n* v. *Sims,* 318 U. S. 608, 63 S. Ct. 807, 812, 87 L. Ed. 1032, required him to dismiss the reorganization proceeding under Chapter X and to proceed with the pending bankruptcy proceeding against the debtor. In *Fidelity Assurance Ass'n* v. *Sims, supra,* it was found that the petition for reorganization under Chapter X had not been filed in good faith because from the very outset it was apparent that no readjustment of the rights of creditors was possible and that 'the interests of creditors would be best subserved in the pending prior proceeding in West Virginia and other states.' See our opinions in *Re Loewer's Gambrinus Brewery Co.,* 2 Cir., 141 F. 2d 747, 749, and *Country Life Apartments* v. *Buckley,* 2 Cir., 145 F. 2d 935, 938, quoted as distinguishing *Fidelity Assurance Ass'n* v. *Sims* in *Matter of Lorraine Castle Apartments Bldg. Corp.,* 7 Cir., 149 F. 2d 55."

The case which it cited from the Seventh Circuit was written by the same judge who wrote the opinion in the instant case. He overlooked that here, it appeared "at the very outset" that *liquidation* and not *reorganization* would be "the only outcome."

(b) The lack of the jurisdictional allegations was fatal.

Not only were the petitioning creditors defeated by the *proof,* but their jurisdictional *allegations* were *fatally* defective. They alleged (R. 8; par. 15) that "the secured indebtedness must be liquidated". This came within the rule announced by the Sixth Circuit in *Hoehn* v. *McIntosh,* 110 F. (2) 199, calling for a dismissal of the case, where the court said:

> "Conceding without deciding, that the present suit in the State of Ohio, because of a lack of process, had not reached the state of a proceeding *in rem* and that the constructive possession of the *res* does not vest until service of process, we think it nevertheless necessary, in order to oust the Ohio court of jurisdiction that the trustee show there was an equity in the mortgaged property for the bankrupt estate, otherwise it has no interest to subserve in ousting the State Court of jurisdiction. We think the record in this case fails to show such equity. *Ford* v. *Mutual Benefit Life Ins. Co.,* 82 Fed. (2d) 607; In *re Rohrer,* 177 Fed. 218; *Hiscock* v. *Varick Bank,* 206 U. S. 28."

This view was also adopted by the Seventh Circuit in *Sheridan View Bldg. Corp.,* 149 F. (2) 532 where it said:

> "The petition must set forth the essential fact constituting the right to proceed in bankruptcy when a prior proceeding is pending the petitioners showing of 'need for relief' must demonstrate that at least in some substantial particular the prior proceedings withhold or deny creditors' or stockholders'

benefits, advantages or protection which chapter X affords."

The attempt to distinguish this case (Tr. 61) on the "facts" was *futile* in view of the fact that it held that failure to *plead* jurisdictional fact was *fatal* in that case.

Failure to *plead* jurisdictional facts on questions whether the corporation can be reorganized for the benefit of creditors and stockholders was held fatal by the Sixth Circuit in *Re: Western Tool and Mfg. Co.*, 142 F. (2) 404 (reversed on a different point 324 U. S. 100). There the Court said (p. 410):

> "The purposes of liquidation (Chapter X) were (1) to avoid immediate liquidation of the property involved in the reorganization of a corporation *with a view to rehabilitating rather than liquidation*, (2) to afford a respite to corporations in financial difficulties so the owners and creditors might have time to recapitalize or refinance *and to preserve for all parties concerned intangible values which are usually a part of the assets of all going businesses and inseparable from its tangibles.*" (Emphasis supplied.)

This case was cited with approval on this point by the Seventh Circuit in *Sheridan View Bldg. Corp., supra.* To the same effect is the case of *In re* 325 *East* 72*nd Street*, 53 Fed. Sup. 997, 1001.

(c) The petitioning creditors did not meet the burden of proof to sustain jurisdictional requirements for an involuntary petition.

It is unnecessary to discuss whether the allegations contained all of the jurisdictional requirements under Chapter X. It is sufficient to show that there was an entire lack of proof to sustain the jurisdictional require-

ments even in the absence of the Master's findings that the proof showed that the jurisdictional requirements did not exist. The petitioning creditors were required to prove in addition to the allegations under Section 130 concerning voluntary petitions, *the jurisdictional allegations under Sections* 131 and 146. There was no evidence on the part of the petitioning creditors showing the essential facts required by Chapter X, that the prior proceeding pending in the State Court was insufficient to grant the relief to the first mortgage bondholders, nor was there any proof tending to show the "need for relief". That this was jurisdictional was held in *Sheridan View Bldg. Corp.*, 149 Fed. (2) 532, which the Seventh Circuit attempted to distinguish on a different point but is not distinguishable on this point. No evidence was offered in support of the petition except that the petitioning creditors attached to their brief the record on the previous appeal in Case No. 8472 (Tr. 12) as Petitioners' Exhibit 1. Witter's counsel *objected* to the procedure on the ground that it was necessary for the petitioning creditors to sustain the jurisdictional allegations by proof. There is nothing in Petitioners' Exhibit 1 tending to sustain the jurisdictional requirements under Chapter X.

This Exhibit was made a part of this record (Tr. 13) and by stipulation of the parties it was omitted from the printed record because it was printed in Case No. 8472 (Tr. 39). It was on the basis of the omission of this exhibit from the printed record that the Circuit Court of Appeals first held that the exhibit was not before it and it had to assume that the exhibit sustained the order on the jurisdictional requirements (Tr. 61). On rehearing the Court *conceded its error* (Tr. 95) but stated that it had examined the exhibit together with other exhibits referred to (the record in Case No. 8098) and that these

exhibits substantiate the approval of the order. What is there in these exhibits that prove the jurisdictional requirements? These exhibits were fully discussed in the petition for rehearing (Tr. 4-8). It was demonstrated there that the jurisdictional requirements were not sustained by the exhibits. The Court of Appeals satisfied itself with the bare assertion that the exhibits substantiated its conclusions. These exhibits are before this Court. The record in Case 8472 is here (323 U. S. 757 No. 404). The record in Case 8098 is also here (320 U. S. 211). We ask this Court to look at the exhibits in connection with their discussion in the petition for rehearing (Tr. 4-8). It could come to no other conclusion that *none of the jurisdictional requirements were proven by these exhibits.*

A hearing on a contest on the "good faith" by an answer is not to be perfunctory. The petitioners had the *burden to prove* the jurisdictional facts (*Duggan* v. *Sansberry,* 90 L. Ed. 622, March 4, 1946). There this Court pointed out that under Chapter X even where a Court approved *ex parte* the petition as filed in good faith it had no effect upon the subsequent answer contesting the good faith of the petition, and that the proper construction of the provisions of Chapter X lead to the conclusion that the approval of a petition prior to the contest is to have no weight and that upon the filing of the petition the burden rests upon the petitioning creditors to prove the allegations with proper evidence. This Court pointed out that on the order of approval under Section 141 which consists "first" of a conclusion of law to the effect that the petition is sufficient in respect of its allegations and "second" of a finding of fact that the petition is filed in good faith operates as not to make the *ex parte* determination conclusive and that the hearing on the contest con-

stitutes a second hearing upon which the burden rests upon the petitioning creditors to sustain the jurisdictional allegations by competent proof. In that case this Court said:

> Thus, under §§ 137 and 144, an answer could be filed to National's petition, denying that National was a subsidiary of Christopher, and asking that the petition be dismissed. The judge would then be obliged to hold at least a summary hearing, see *Re Cheney Bros.* (D. C.) 12 F. Supp. 609, 611, 30 Am. Bank. Rep. (N. S.) 741, a material allegation being controverted, and to decide the disputed issue on its merits.
>
> In as much as the interested parties thus had an opportunity in the reorganization proceeding to dispute the allegation of National's petition that a parent-subsidiary relationship existed between it and Christopher and by doing so to have that issue determined on the facts, we think it plain that Congress intended that the same issue could not be tried collaterally in the bankruptcy proceeding."

In the instant case *no opportunity* was given to try the facts as to the "good faith" and when Witter's attorney made an "offer" of proof (Tr. 15-17), the Court said: "If that is competent, I am *not* going to pass on it. You may present that to the Master." The Court then approved the petition as filed in good faith and the respondents proceeded before the Master who rendered his report recommending the *vacation* of the order approving the petition as filed in good faith, which the Circuit Court of Appeals entirely ignored. It is evident that not only was the burden of proof not met, but *the proof did not sustain the allegations* and it was the duty of the Circuit Court of Appeals to reverse the order and to direct the dismissal of the proceedings.

III.

The jurisdiction under Chapter X in the absence of a restraining order and a supersedeas on appeal attached from the date of the approval of the petition and not from the filing date.

The holding in this case that the jurisdiction of the Federal Court upon the approval of the petition on March 13, 1945, antedated from the filing date, July 8, 1943, and that this operated as an attachment on the foreclosure proceedings is based on a misconception and a failure to distinguish between proceedings under Chapter X and proceedings in ordinary bankruptcy.

It is true as stated in the opinion (Tr. 62) that Sections 102, 111, 112, 114 and 115 of Chapter X provide that the jurisdiction under that Chapter is the same as the jurisdiction in bankruptcy. The Court, however, overlooked that each of these provisions contain the words "where not inconsistent with the provisions of the Act" and that the provisions in Chapter X for a temporary restraining order is inconsistent with the provisions in ordinary bankruptcy. Section 113 of Chapter X (111 U. S. C. A. 513) provides for a temporary stay of foreclosure *prior* to the approval of the petition. The provision for the *temporary stay* clearly shows the intent of Congress that the approval of the petition shall not affect pending foreclosures *unless a temporary restraining order was issued.* The further provision in Section 148 (11 U. S. C. A. 548) that the *approval* of the petition "shall operate as a stay of a prior * * * mortgage foreclosure" *runs counter* to the holding that a subsequent approval antedates as of the filing date.

These views find support in *Long Island Properties, Inc.,* 42 F. Supp. 323, where the court said (p. 324):

> "Prior to the enactment of the Chandler Act, it was well established that the mere filing of a petition in Bankruptcy or reorganization did not interfere with the power of a State Court to continue a pending foreclosure."

The court cited *Murel Holding Corp.*, 75 F. (2) 941, and *Coney Island Hotel Corp.* v. *Van Schack,* 76 F. (2) 126, involving proceedings under Section 77B. In holding that not only did Chapter X *not change the rule,* but rather *"confirmed that rule",* it said:

> "There is nothing in the Chandler Act which expressly modifies that rule; to the contrary, **there is implicit in the carefully designed scheme of that Act a legislative intent to confirm that rule.** Thus by Section 113, 11 U. S. C. A. 513, prior to the approval of the petition, a temporary stay of a mortgage foreclosure may be had only upon cause shown, effective until the petition is approved or dismissed. By section 116 (4), 11 U. S. C. A. 516 (4), upon the approval of the petition a proceeding to enforce a lien against the debtors may be stayed until final decree. By Section 148, 11 U. S. C. A. 548, the order approving the petition operates as a stay of a mortgage foreclosure proceeding.
>
> In the presence of these provisions of the statute **it is impossible to stretch** the meaning of Section 111, 11 U. S. C. A. 511, **to embrace an automatic stay** of a mortgage foreclosure immediately upon filing of the petition.
>
> **It follows that the mere filing of a petition for reorganization on July 3, 1941, did not deprive the state court of its power to proceed with the foreclosure.** On July 15, two days before the foreclosure judgment was entered, the power to stay conferred by Section 113, was exercised." (Emphasis ours.)

These views were adopted by the Second Circuit in *Country Life Apts. v. Buckley,* 145 F. (2) 938, *supra.*

It might be added that only because Section 111 of the Bankruptcy Act gives the bankruptcy court exclusive jurisdiction of the debtor or its property, does the bankruptcy court have the **power** to restrain pending state court proceedings. Otherwise, the state court, once having assumed jurisdiction of the debtor's property, could not be ousted from its jurisdiction. However, the Bankruptcy Court must affirmatively exercise its power to deprive a state court of its jurisdiction, once exercised.

All of the cases cited in the opinion as purporting to establish a contrary rule are not in point, because in those cases, the state courts first attempted to assert jurisdiction *after* the petition in bankruptcy was filed and the proceedings were not under Chapter X. The case of *Isaacs* v. *Hobbs Tie & Timber Co.,* on which the court relies, is analyzed and distinguished by the same Court *In the Matter of Ella Tinkoff,* 141 Fed. (2d) 731. There, the court said (p. 732):

> "**The mortgages foreclosed in the State court were not vulnerable under the Bankruptcy Act. The State court was in possession of the property and was foreclosing valid mortgages when the petition in bankruptcy was filed. The filing of such petition in and of itself did not oust or affect the jurisdiction of the State court to proceed to final disposition.** The rule in such circumstances is stated thus in *Straton* v. *New,* 238 U. S. 318, 326, 51 S. Ct. 465, 75 L. Ed. 1060:
>
> 'Following these cases the federal courts have with practical unanimity held that where a judgment which constitutes a lien on the debtor's real estate is recovered more than four months prior to the filing of the petition, the bankruptcy court is without jurisdiction to enjoin the prosecution of the creditor's action, instituted prior to the filing of a petition in bankruptcy, to bring about a judicial sale of the real estate.
>
> "The trustee in bankruptcy may intervene in such suits to protect the interests of the estate.'

"The rule enunciated by Justice Miller in the old case of *Eyster* v. *Gaff*, 91 U. S. 521, 524, 23 L. Ed. 403, is applicable to the facts of our case and effectively disposes of the appellants' argument. Justice Miller said:

'It is a mistake to suppose that the Bankrupt Law avoids of its own force all judicial proceedings in the State or other courts the instant one of the parties is adjudged a bankrupt. There is nothing in the act which sanctions such a proposition.

'The court in the case before us had acquired jurisdiction of the parties and of the subject-matter of the suit. It was competent to administer full justice, and was proceeding, according to the law which governed such a suit, to do so. It could not take judicial notice of the proceedings in bankruptcy in another court, however seriously they might have affected the rights of parties to the suit already pending.

'It was the **duty** of that court to proceed to a decree as between the parties before it, until by some proper pleadings in the case it was informed of the changed relations of any of those parties to the subject-matter of the suit. Having such jurisdiction, and performing its duty as the case stood in that court, we are at a loss to see how its decree can be treated as void. • • • '

The proceedings in the State court were valid. Ella Tinkoff is not shown to have any interest in the property for which she seeks to provide an arrangement. There was no error in dismissing her petition." (Emphasis supplied.)

The attempt to distinguish its own decision (Tr. 64) on the ground that the case rested on different facts, is obviously unsound because whatever the facts might have been they could not have affected the jurisdictional requirements of the *pleadings*. In that case the court did not only hold that the jurisdictional requirements had

to be proven, but also that they *had to be alleged.* The case is, therefore, not distinguishable from the instant case.

CONCLUSION.

Petitioners have shown that the decision in the instant case is not in harmony with the decisions of the several Circuit Courts of Appeal and with the view of this Court as interpreted by the several Circuits. The involuntary petition was fatally defective in its jurisdictional allegations, and there was a complete failure of proof to meet the burden of good faith which was cast on the petitioning creditors upon the contest on such issue. There was no hearing before the Court as contemplated by the Act. The Master in Chancery rendered his report on the merits that the debtor was divested of all interest in the property prior to the approval of the petition as filed in good faith and that the title was in a stranger to the proceedings who acquired it in a foreclosure which was not stayed by the Bankruptcy Court and that no supersedeas was issued on the appeal from the dismissal of the bankruptcy proceedings. He found that the purpose of the proceeding was a liquidation at the outset and not a reorganization and that such a proceeding could not be invoked under Chapter X. He recommended the vacation of the order approving the petition as filed in good faith and the dismissal of the petition. In view of the fact that the court did not pass on the offer approved in entering its order approving the petition as filed in good faith but reserved that question for the determination by the Master in Chancery and in view of the further

fact that the Master sustained Witter and recommended the dismissal of the petition for lack of good faith, the appeal became moot upon the sustaining of the Master's report by the District Court and it was the duty of the Circuit Court of Appeals to grant the motion to postpone the hearing on the appeal pending the disposition of the hearing on the Master's report. The opinion in the instant case is not in harmony with the fundamental law in reorganization proceedings under Chapter X and is clearly erroneous. The writ should be issued to harmonize the decisions on an important question of federal administration.

Respectfully submitted,

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Of Counsel.

Dated May 20, 1946.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

No. 1[redacted] 117

IN THE MATTER OF
PEER MANOR BUILDING CORPORATION,
Debtor.

W. D. WITTER AND JOSEPH WILLENS,
Petitioners,

vs.

G. J. NIKOLAS, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONERS' REPLY.

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Cases Cited.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

No. 1254

IN THE MATTER OF

PEER MANOR BUILDING CORPORATION,
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W. D. WITTER AND JOSEPH WILLENS,
Petitioners,

vs.

G. J. NIKOLAS, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONERS' REPLY.

STATEMENT.

Faced with a joint petition for the granting of the writ of certiorari by Witter who was a party to the proceeding below, and by Willens, who acquired the title to the property in a foreclosure proceeding which respondents *admit* was within the jurisdiction of the State Court, the respondent well aware that, because on their appeal they failed to file a supersedeas, the title of Willens, a

stranger to the proceedings, is unassailable both under State and Federal law, respondents confined their answer to the petition of Witter. Not one word is to be found in their answer to the argument of petitioner Willens. *This alone is sufficient for the granting of the writ.*

A.

Respondents' "Facts".

The undisputed "fact" that the Federal Court was in possession under a *void* order during the short period from June 18, 1942, to September 21, 1943, did not justify, as respondents urge (pp. 3-4), the statement in the opinion that "the management of the property has been under the tutelage of the District Court ever since the petition was filed". The Federal Court *was never in possession under the petition.* After its ouster, (134 F. (2d) 839), the possession was returned to the State Court, which *remained* in possession from September 21, 1943, to the date of the approval of the petition on March 13, 1945.

The contention (p. 5) that the "only matter set up in the Answer" of Witter contesting the "good faith" that "was not already set up" in the Answer of Peer was "the completion of the partial foreclosure", is contrary to the record. Witter's Answer alleged (Tr. 6) that the property was not owned by the corporation since February 8, 1944, and there was nothing to reorganize, liquidate, or rehabilitate. *This was a new issue.* He further alleged that no restraining order was issued under Chapter X and the conveyance resulting from the sale on February 8, 1944, *was before the approval of the petition.* This issue does not appear in Peer's Answer. He also alleged (Tr. 6) that no Plan of Reorganization could be

effected under section 146 (3). *This issue was not raised in Peer's Answer.*

Witter's Answer also alleged the pendency of the complete foreclosure in the State Court and the absence of a showing that the foreclosure was inadequate to grant the relief as required under Section 146 (4); that (Tr. 7) since the Plan of Reorganization contemplates a *liquidation* and *not* the reorganization of the Debtor *as a going concern,* the petition was *not* filed in "good faith". The Answer denied (Tr. 8) that the creditors would be obliged to sacrifice their claims if there were a liquidation in a State Court, and *affirmatively* stated that real estate values are considerably enhanced at this time, and that that type of reorganization can be procured in the pending State Court proceedings. *None of these issues were even mentioned in the Peer Answer.*

The inconsistency of respondents appears from the fact that when they desire to supply a fact which does not appear in the printed record they resort (p. 4) to the former record which is on file in this Court, but when they are in no position to justify *fatal defects* in their petition, they about-face, saying: (p. 6) "This petition" (the petition for reorganization) "is not included in the record" and "hence, is not properly before the Court". The record contains (Tr. 39) a stipulation that the Transcript of Record in Case 8472 "need not be printed"; and that other documents which appear in that printed record need not be reprinted and that the parties may refer to that record. The petition for reorganization *appears in that record* (pp. 2-10) which is also on file in this Court (No. 404) of which this Court takes judicial notice (*Nahdel Corp.* v. *West Virginia Pulp & Paper Co.,* 141 F. (2) 1, 2; *Alabama City etc.* v. *Bates,* 155 Ala. 347, 351). There is, therefore, "drawn into consideration"

the "contention" that petitioning creditors proposed a new corporation to be created for the purpose of acquiring all of the assets of the Debtor for the *exclusive* benefit of the first mortgage bondholders, and the question, therefore, is *properly* before the Court.

Respondents reiterate (p. 6) their assertion that "the petition was not brought up" in this record in their attempt to evade the *fatal* defects of their petition which did not plead "the need for relief under Chapter X", which petition is in the record as shown above. In the next breath they say that the petition *"is in the record* in Case No. 404", but that the question "was put in issue" on the hearing concerning the jurisdictional question. Whether or not the question was put in issue on the hearing of the jurisdictional question is of no importance, because a *determination* of a jurisdictional question *is not a determination on the merits.* (*Topping* v. *Frey,* 147 F. (2) 715, 717; *Electrotype Co.* v. *Grand Rapids Co.,* 256 Mich. 311, certiorari denied 286 U. S. 545; *Smith* v. *Johansen,* 236 Ill. App. 339, 343.)

It is contended that certain exhibits appear in Case No. 404 which support the "good faith" of the petition and these exhibits are not in the record. The Court of Appeals at first reached such a conclusion (Tr. 61). However, after it was demonstrated in the petition for rehearing that these exhibits *were in the record* and were printed (Tr. 5), the Appellate Court was *forced to admit its error* and to say that the exhibits were before it, and that it considered the exhibits (Tr. 95). The argument, therefore, is completely without merit, particularly, when *all of the documents appear in the record* which was on file in the Court of Appeals and is on file in this Court.

B.

The "Questions Presented".

The First Question:

Respondents contend (p. 7) that the five questions presented in the petition are "spurious and do not properly arise on the record". They say in order not to "engage in shadow-boxing on false issues", the *first* question "is not properly raised on this record and is a false issue", because of the finding of the court that "a reorganization was feasible". The *absurdity* of the contention is apparent. The object of a review is to have the upper court *determine the correctness of the decision below.* A "finding" below does *not* eliminate the question on review. The question of *feasibility* was not before the trial court nor before the Court of Appeals on the issue of "good faith". As a matter of fact the Master in Chancery found on the issue of "feasibility" that the plan of the Debtor was *not feasible* (Tr. 54).

The Second Question:

Respondents further say (p. 8) that another "false issue" is raised by the *second* question "whether it was proper to approve an involuntary petition as filed in good faith in the face of an answer contesting good faith without requiring the petitioners to prove the specific facts as requred in Sections 130, 131 and 146 of Chapter X". This alleged *falsity* of the question is based on the *false assertion* that this is "an academic issue" because of the finding of the trial court that these facts have been proven, and on the contention that if petitioner wished to test this issue he should have "raised the question as to whether there was evidence proving such facts". We have already shown that the finding of the

trial court does not remove the question from a review by the upper court. The assertion that the question was not raised is *false,* and the *falsity appears from the record* (Tr. 12), where it was expressly urged that *"there is no evidence adduced here as to the good faith".*

The Third Question:

After quoting the *third* question (p. 8) respondents say "a proper question" is raised by the first part of the question: "whether an involuntary petition for corporate reorganization under Chapter X was properly approved as filed in good faith when it appeared that the assets of the Debtor were less than the amount due on the first mortgage bond issue and that no conceivable plans could be adopted whereby equity owners and other creditors could participate in the reorganization", if there had been presented to the Court "sufficient record" to show that no conceivable plan could be adopted. Not only does the record present the petition which *on its face shows that no conceivable plan could have been adopted* for the benefit of other creditors or stockholders, but the Master *found* on the hearing concerning the plan that *no conceivable plan could be adopted* which would benefit any of the stockholders or other creditors, except the first mortgage bondholders.

They say that the last part of the question is "based upon an *assumption* that there was no showing that the State Court proceeding was inadequate to grant relief. They urge that this is contrary to the finding of the Court. The argument is again built on false premises that a finding destroys the presentation of the question for review. The question whether the finding is supported by any evidence is not determined by the finding, but by the evidence (*Chatz* v. *Armour Plant Employees' Credit Union,* 154 F. (2) 236, 239).

The Fourth Question:

The contention (p. 9) that the *fourth* question is not properly presented because the Master's Report was not before the trial court when it entered the order of good faith is completely without merit because the writ of certiorari is sought to review the judgment of the Court of Appeals, and the Master's Report was *properly presented and considered by that Court.*

The Fifth Question:

Respondents concede that the *fifth* question states a correct issue.

Their contention that all of the other questions are not before the Court is completely without foundation as shown above, and their desire to *escape* the other questions is due to their inability to find an answer.

C.

The "Argument".

Being in no position to sustain the decision below, respondents advance the argument (p. 11) that the Court of Appeals did *not hold* that the completion of the partial foreclosure was *void,* but that it was only *voidable,* depending on the outcome of the appeal which did not operate as a supersedeas. Under this admission the title of Willens, one of the petitioners, was unassailable and there was nothing to reorganize and this alone is sufficient for the granting of the writ.

In answer to the point that in the absence of a restraining order or a supersedeas there was no pending proceeding, counsel say (p. 15) that an "appeal" operates as a continuance of the suit. The pendency of proceedings for *appeal purposes* does not operate as a "pending

case" when referred to in an independent proceeding in another court (*General Tennessee Corp.* v. *Penn. Nat. Hardware,* 17 F. (2) 383, 384) and even where a supersedeas is granted *it does not affect the finality of the decree or order* in relation to another suit based on such order (*Huron Corp.* v. *Lincoln Co.,* 312 U. S. 183, 189). There was, therefore, no justification for the statement in the opinion that the completion of the partial foreclosure was "a fraud on the Bankruptcy Court" which dismissed the case for want of jurisdiction, particularly, when there was *no supersedeas.*

Respondents say (p. 15):

> "The logical conclusion is that the State Court had jurisdiction to act on the subject matter, if its jurisdiction had not been supplemented by the Bankruptcy Court. However had the ultimate conclusion been that the Bankruptcy Court was without jurisdiction, the action of the State Court would have been valid; but since it was ultimately concluded that the Bankruptcy Court did have jurisdiction from the time of the petition, then the action of the State Court became voidable "and hence, the Circuit Court of Appeals was justified' in finding that the completion of the partial foreclosure was 'an attempted fraud upon the court'."

We know of no case where the decision of a State Court which "had jurisdiction" is "voidable" depending upon an appeal in another case which did not even operate as a supersedeas. Respondents also lost sight of the fact that the title was conveyed to petitioner Willens, a *stranger* to the proceedings before the reversal, and in the *absence of a supersedeas his title was not voidable* (*Finlen* v. *Skelly,* 310 Ill. 170, 179; *Barnard* v. *Michael,* 392 Ill. 130).

The Answer of respondents (pp. 16-18) to Point I (b) of the petition (pp. 22-23) is completely devoid of merit and does not warrant a reply.

The distinction between an appeal which operates as a supersedeas and an appeal which does *not* so operate was not invented by these petitioners, but is the *distinguishing feature* which *this Court* made in *Union Joint Stock Land Bank* v. *Byerly,* 310 U. S. 1, and *Wayne United Gas Co.* v. *Owen-Ill. Glass Co.,* 300 U. S. 131. This is also the State law.

Respondents evade the point that the decision in the instant case that the petition was filed in good faith in the face of the contest at the outset when it appeared that the property was valued less than the first mortgage bond issue and there was nothing for creditors or stockholders to participate in the reorganization, is in conflict with the decisions of this Court as construed by other Circuits, and say (p. 28) that it is "an academic issue" and that "the merits need not be determined". They do not deny that the decision is *irreconcilable* with the decision of this Court as construed by other circuits. They contend that their petition did "not allege that the property should be liquidated", but merely *suggested* that "liquidation of the assets was the only alternative to reorganization under Chapter X" and they suggested a plan for giving stock to the first mortgage bondholders and that nothing of value be given to the parties having interests junior to the first mortgage bondholders" and also suggested "that the business be carried on under corporate structure and that the value of the assets be preserved by avoiding liquidation". The references to the pages in their petition (which printed petition appears in Case No. 404 heretofore filed in this Court) conclusively demonstrates that the proceeding was ini-

tiated to *eliminate all creditors and stockholders* and to *liquidate* the property for the sole benefit of the first mortgage bonds. At page 8 of the petition they alleged that they had "formulated a plan" which contemplated the exchange of the first mortgage bonds for the common stock to be issued by the reorganized corporation, *leaving nothing for other creditors and* stockholders because there was *no equity for them.* The petition stated that in order to effectuate a feasible reorganization the secured indebtedness "must be liquidated". The issue is, therefore, not academic.

Answering the point that the petition was fatally defective in the jurisdictional allegation of "good faith" which failed to allege that the pending proceeding was inadequate, and the failure to *prove* the inadequacy of the prior proceedings, respondents say that their petition *did* allege the inadequacy of the prior proceeding and the need for relief. Mere conclusions are insufficient and the facts were not alleged. Even a factual allegation is insufficient if not supported by proof when contested by answers. Instead of offering proof at the hearing, respondents are now offering an "argument". They may not substitute their "argument" for "proof". The jurisdictional issue as to the allegations having been challenged by the answer it was the duty of the respondents to "establish" the allegations by "proof". *Schefler* v. *Schefler,* 155 F. (2) 221, 222. Their "argument" to the contrary is refuted by the decision in the *Sheridan-View* case where the Seventh Circuit decided that under the Illinois law, a reorganization plan could be approved in the State Court to the same extent as it could be under Chapter X.

Respondents state (p. 27) that the Findings of Facts which were alleged and proved are set forth in the opinion of the Circuit Court of Appeals*. Findings of Facts

* The Court of Appeals was without jurisdiction to resolve question of fact with respect to which the ~~bondholders~~ Court below made no findings (Bowles v. Hayes, 155 F. (2) 351).

that have no support in the evidence are of no avail and are open for examination on appeal where they are challenged as unsupported by evidence (*Chatz* v. *Armour Plant Employees' Credit Union*, 154 F. (2) 236, 239). Realizing that there is no support in the record for the findings, respondents resort to the contention that the transcript does not contain all of the evidence and they say that this Court cannot rely on the Clerk's certificate. They had a chance when the Designation of the Record was served upon them to *supply any alleged facts* and their failure to do so indicates that there were no other facts to be supplied. *No such contention was ever made below* and this contention is, therefore, unavailable to them now.

The contention (p. 27) that the trial court heard evidence concerning the motion to dismiss the petition for want of jurisdiction on the Answer of Peer and that under Section 545 an issue raised in an answer which was tried "and finally determined is conclusive upon a subsequent answer filed by another creditor", is completely without merit because there was no determination on the merits when the court dismissed the proceedings for want of jurisdiction.

The "Findings of Fact and Conclusions of Law" on the previous hearing were (1) on the question of jurisdiction which was decided adversely to the Debtor on the first appeal; and (2) whether the evidence showed that the Debtor was an unincorporated company. The court found (R. 404, p. 63): (1) that the issue whether the Debtor was a corporation was adjudicated on the first appeal and the adjudication that it was not a corporation constituted *res judicata;* and (2) *that the court was without jurisdiction of the subject matter.* Having decided that it had no jurisdiction, it could not have decided the facts on the merits of the case. The contention that the facts set forth in Peer's Answer were all decided is therefore *baseless.*

A court cannot decide the merits of a case when it has no jurisdiction of the subject matter and all it can do is to direct the dismissal of the proceedings (*Jones* v. *Brush*, 143 F. (2) 733).

Respondents say (p. 28) that petitioners incorrectly assert that no evidence was offered in support of the petition excepting the record on the former appeal which was attached as Petitioners' Exhibit I. They concede that this is the only evidence that they offered but they say that this record "was not brought up, nor were Exhibits I-a, I-b or I-c, which were excused from printing in case No. 8472 reprinted. The only evidence that they offered in the trial court was the printed record in No. 8472 as it then stood (Tr. 13). Exhibits I-a, I-b and I-c were not printed and the court did not have these exhibits.

Faced with the Master's Report, who found *after hearing evidence* that the petition was *not filed in good faith;* that no feasible plan could be adopted for reorganization, and who recommended the *vacation of the order approving the petition as filed in good faith,* counsel resort to the technicality that the printed record does not contain the signature of the attorney for the petitioners to the motion and verification. To overcome this technicality we are supplying a certified copy of the original which was filed in Court, containing the signature and verifications.*

It is urged (p. 31) that the Master in Chancery was without jurisdiction to determine the merits while the matter was pending on appeal. This was the position of the petitioners herein (Tr. 45-46) but it was the respondents who prevailed upon the District Court to direct the Master to proceed with the hearing over petitioners' objection. The parties who urged that the jurisdiction existed are *estopped* to contend on appeal that jurisdiction

* See Appendix "A".

was lacking. (*Schulte* v. *Douglas*, 90 Conn. 529.) Having taken one position below they cannot take a different position on appeal (*Irongate Bank* v. *Brady*, 184 U. S. 665, 668; *Davis* v. *Wakalee*, 156 U. S. 680, 689. The respondents proceeded before the Master on their "plan" in disregard of the appeal. The fact that the Master decided that their petition was not filed in good faith and that no conceivable plan could be adopted, does not give them the right to urge here that the Master was without jurisdiction. This is contrary "to the first principle of justice". (*Davis* v. *Wakalee, supra.*)

Conclusion.

Petitioners have demonstrated that the opinion below is in conflict with the decisions of this Court and with the decisions of other circuits. There is no denial in respondents' Answer that a conflict exists. Therefore, the writ should be allowed.

Respondents realize that they have no defense to the petition of Joseph Willens who acquired the title to the property in a foreclosure case of which it is now *conceded* that the State Court had jurisdiction. No supersedeas was filed. Petitioner Willens was a stranger to the proceedings. He should not be compelled to go through with a costly litigation in the District Court and in subsequent appeals when the record presented to this Court shows that he was the absolute owner and he was not even made a party to the proceedings, and that the Debtor's title was

completely wiped out by the foreclosure which ripened into a deed and a conveyance to the third party. It follows that the writ should be awarded.

Respectfully submitted,

MEYER ABRAMS,
HAROLD J. GREEN,
Attorneys for Petitioners.

APPENDIX "A"

Motion of W. D. Witter filed in the United States Circuit of Appeals in the above matter, contains the signature of Harold J. Green, the attorney for the appellant.

The suggestions in support of the motion contains the signature of Harold J. Green as the attorney for the appellant, and is acknowledged on January 26, 1946, by P. Ruder, Notary Public.

The report of the Master in Chancery is signed by Charles A. McDonald, Master in Chancery, United States Circuit Court.

There is attached thereto a certificate by the Clerk of the United States Circuit Court of Appeals, dated July 18, 1946, certifying that the document containing the motion, suggestions, and verification is a true copy of the original which was filed in that Court on January 26, 1946.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945.

No. 254 117

IN THE MATTER OF
PEER MANOR BUILDING CORPORATION,
DEBTOR.

W. D. WITTER AND JOSEPH WILLENS,
Petitioners,

vs.

G. J. NIKOLAS, ET AL.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION.

WALTER E. WILES,
Attorney for Respondent, G. J. Nikolas, G. J. Nikolas and Company, Inc., and Harry Foote.

GEORGE E. Q. JOHNSON,
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THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

SUBJECT INDEX.

LIST OF AUTHORITIES.

STATUTES CITED.

SUMMARY OF ARGUMENT.

1. Where involuntary petition is filed under Chapter X of the Bankruptcy Act and dismissed for want of jurisdiction and appeal taken in due season without restraining order or supersedeas, the action of one of the parties to that proceeding without notice obtaining a partial foreclosure of mortgage on assets of corporation debtor in a State court proceeding during the pendency of the appeal will not deprive bankruptcy Court of jurisdiction of assets of debtor when the ultimate outcome of appeal is a reversal of the District Court order of dismissal and when pursuant to mandate of Court of Appeals, District Court enters an order approving petition as properly filed 13-14

2. When involuntary petition is filed under Chapter X of the Bankruptcy Act, an order entered at any subsequent time approving the petition as filed in good faith relates back to the date of the filing of petition for attaching of the jurisdiction of the Bankruptcy Court and the jurisdiction is exclusive and superior to that of any other court over the assets of the debtor to which the debtor had any title at the time of the filing of the petition.....13-14

3. The action of one of the parties to a proceeding on an involuntary petition for reorganization under Chapter X of the Bankruptcy Act attempting by partial foreclosure in a State Court to obtain title to the assets of the debtor corporation while an appeal from the order of the District Court dismissing the petition is pending is a fraud on both courts and when thereafter the petition is approved

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945.

No. 1254.

IN THE MATTER OF
PEER MANOR BUILDING CORPORATION,
DEBTOR.

W. D. WITTER AND JOSEPH WILLENS,
Petitioners,

vs.

G. J. NIKOLAS, ET AL.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION.

A.

STATEMENT OF FACTS.

The Statement of Facts as they appear in the petitioner's brief are so confused and inaccurate because of error and omissions of essential matters that less space will be used and more clarity achieved by making a new Summary of the Facts than could be accomplished by pointing out the errors and omissions.

The Peer Manor Building Corporation was originally an Illinois corporation. After a dissolution of this corporation for non-payment of taxes, a petition for reorganiza-

tion under Chapter X of the Bankruptcy Act was filed against Peer Manor Building Corporation, an Illinois corporation, by these respondents and an Indenture Trustee as petitioners in what they contended was a pending case. See *In the Matter of Peer Manor Building Corporation*, 134 F. 2d 839. On appeal from the Order of the District Court approving this Petition, the Circuit Court of Appeals, Seventh Circuit, held the District Court to be without jurisdiction, giving two reasons: one, that there was no pending case within the meaning of the statute, and the other, that there was no entity before the court for reorganization. See Opinion of the Circuit Court of Appeals, 134 F. 2d 839. This court denied Certiorari in that cause, 63 S. Ct. 1447, 320 U. S. 211.

On July 8, 1943, an Involuntary Petition under Chapter X of the Bankruptcy Act was filed by the respondents herein as the owners of $95,000.00 in principal amount of first mortgage bonds against the Peer Manor Building Corporation, an unincorporated company. (It was contended that certain persons in interest were carrying on the business of the company after dissolution in corporate manner and form, and hence, constituted an unincorporated company, subject to jurisdiction of the bankruptcy court as such.) Separate answers to this Petition were filed by J. Marshall Peer and L. V. Whitney, two of the alleged members of the unincorporated company or association, and a Motion to Strike was filed by W. D. Witter, a first mortgage bondholder. (These instruments are not shown in the record herein, but do appear in the record filed in this court in the former case No. 404 in this court. The petition appearing on pages 2 to 10 of that record, and the Answer of Peer appearing on pages 11 to 20, and the Answer of Whitney, appearing on pages 20 and 21 of the same record. The Motion to Dismiss filed by Witter appears on pages 22 to 28 of that record.)

This cause was set for hearing on the original Petition and the Answer thereto and on the Motion to Dismiss, which fact is shown in court proceedings on page 29 of the above mentioned record in case No. 404 in this court and as is also recited in the finding of the District Court appearing on pages 64 and 65 of the same record. Hearings were had, evidence was heard, and the court ruled that the issues in this cause were *res adjudicata* by reason of the decision of the United States Circuit Court of Appeals for the Seventh Circuit in the former case reported in 134 F. 2d 839, bearing the same title. An appeal was taken from the order, which appeal was entered on October 14, 1943, and in due course the Circuit Court of Appeals for the Seventh Circuit reversed the District Court and remanded the cause with instructions to the District Court to proceed with the reorganization of the debtor. (Tr. 4.) This decision was made on June 16, 1944, but the Mandate was filed on November 2, 1944, after further proceedings. (Tr. 2-5.) The Opinion of the Circuit Court of Appeals for the Seventh Circuit in this matter appears in 143 F. (2) 769.

The petitioner herein, W. D. Witter, was a party respondent to that Appeal and participated actively therein. He petitioned this court for certiorari, which petition was denied 65 S. Ct. 90.

At the time of the filing of the Petition on July 8, 1943, there was pending a Petition for partial foreclosure by W. D. Witter in the Superior Court of Cook County seeking to foreclose on a basis of a $500 bond held by him. There was also pending a Petition by the Indenture Trustee to foreclose on the entire first mortgage issue of $154,000. The property, however, at the time of the filing of the Petition was in the actual custody of J. Marshall Peer, as agent for one Fred E. Hummel, who had been appointed as trustee in the proceeding filed against the Peer Manor Building Corporation as an Illinois corporation in which

proceeding the court was held to be acting without jurisdiction. A former receiver in the State Court proceeding had been discharged by the State Court, and the property was not by any test in the custody of the State Court at that time. The petitioner herein, however, has not seen fit to bring up the record that covers this phase of the matter. Hence, no reference can be made to the record involved and this Statement is made on the record filed in this Court in Case No. 404. It demonstrates that the petitioner has not produced any of the record upon which to base his contention that the property was in the custody of the State Court at the time of the filing of this Petition.

While the Appeal from the Order dismissing the Petition filed on July 8, 1943, was pending, and while W. D. Witter was participating in that Appeal, he, Witter, on November 8, 1943, without notice to the respondents, who were the appellants in that matter, proceeded to obtain a Decree of partial foreclosure in the State Court without informing the State Court of the pending Appeal in the Bankruptcy Court, all of which is shown by the record filed in Case No. 404 in this Court. Since the District Court dismissed the case, it did not issue any injunction and no supersedeas was obtained. On February 8, 1944, the Superior Court of Cook County, Illinois, entered a supplemental decree ordering a Special Commissioner to convey the property involved to W. D. Witter. (Tr. 20-21.)

On June 16, 1944, the Circuit Court of Appeals for the Seventh Circuit reversed the order of the District Court, as indicated above, and held that the court did have jurisdiction. (Tr. 4.) Petitions for Rehearing were filed by Witter and denied July 13, 1944, and Petition for Certiorari was filed by Witter in this court and denied 65 S. Ct. 90.

After the Mandate of the Circuit Court of Appeals was filed on November 2, 1944, in the District Court remanding the case with direction to proceed for reorganization (Tr.

2-5), on November 20, 1944, Witter filed an Answer (Tr. 5-10). The only matter set up in the Answer of Witter that was not already set up in the Answers of Peer and Whitney, and hence before the District Court when hearings were had on these Answers on September 14, 1943, and other dates previous thereto, was the fact of the completion of the partial foreclosure during the pendency of the Appeal. (This can be determined only by comparison of Witter's Answer 5-10 with the Answer of Peer, which appears on pages 11-20 of the record in case 8472 in the Seventh Circuit Court of Appeals, and the Answer of Whitney appearing on pages 20-21 of the same document which record was introduced as an exhibit in this case in the District Court as Petitioners' Exhibit 1 (see Tr. 2) and which exhibit was before the Circuit Court of Appeals without reprinting by Stipulation of the parties (see Tr. 37-39) but which is not included in petitioners' designation of record herein (Tr. 99) and hence not in the record filed with this Court, but was a part of the record filed in this Court with a former Petition for Certiorari, which was heretofore denied in case No. 404.)

A hearing was had before the District Court on Witter's Answer at which hearing Witter offered Witter's Exhibit A. (Tr. 20-21.)

Also Witter's Exhibit B (not shown in the record herein) was offered. The petitioners offered their Exhibit 1 referred to above. Briefs were filed and the court took the matter under advisement (no report of this hearing appears in the record here but reference thereto appears Tr. 12-13) and Witter's exhibits were reoffered. (Tr. 13.)

The court finally entered an order making specific findings that the petition complies with the requirements of Chapter X of the Act of Congress relating to Bankruptcy, and that the petition had been filed in good faith. (Tr. 22-30.) It was from this order that Witter prayed appeal to the

Circuit Court of Appeals (Tr. 31) and failed to reverse therein, it was upon the affirmation of the same order that he now petitions this Court for Certiorari.

Another fact is drawn into consideration by the petitioner herein, that is the contention that the petitioning creditors in this petition proposed that a new corporation be created to acquire all assets of the debtor and to issue all of its stock to the first mortgage bondholders. This petition, however, is not included in the record filed herein, and hence, is not properly before the Court.

There is also drawn in issue the contention that the petitioning creditors in their original petition did not plead a need for the relief under Chapter X. Again, we note that the petition was not brought up in this record. This petition was before this Court in the record in case No. 404, but also that same record shows that the same question was put in issue by the sixteenth paragraph of Peer's Answer appearing on page 19 of that record, and hence is now sought to be raised for the second time.

Also it is pointed out that in the evidence before the trial court there was not only Petitioner's Exhibit 1 which was the record before the Circuit Court of Appeals in the former proceeding and which has been presented to this Court only in case No. 404 already disposed of, but there was also before the District Court in the proceeding on the original petition Petitioner's Exhibit 1, 1A, 1B, 1C and a part of Petitioner's Exhibit 11, which were filed with the Circuit Court of Appeals but excused from printing. This is shown by pages 69 and 70 of the record in this Court in case No. 404. All of these exhibits were before the Circuit Court of Appeals in this cause below as was urged by the petitioner herein in his petition for rehearing below (Tr. 70) and acknowledged by the Court in its supplement to its Opinion. (Tr. 95.) These last named exhibits constituting evidence

considered by both the District and the Appellate Court do not appear to be before this Court anywhere.

The index to the record herein improperly refers to the "Opinion of Lindley, D. J., filed February 12, 1946." This is misleading. The opinion shown is the unanimous opinion of the Court with three judges participating.

We recognize that some of our references herein are not shown in the record before this Court but we are forced to make references to other documents and records in order to demonstrate to this Court that the petitioner is seeking a Writ of Certiorari based on an abbreviated record and has not presented to the Court many of the essential facts which were acted upon by the District Court and considered by the Circuit Court of Appeals.

We have made references to the record pages wherever the record involved has been filed with this Court.

B.

The Questions Presented.

In the Petition for Certiorari herein there are presented five questions, but in the brief in support thereof, there are listed three "specifications of errors to be urged." These questions in both enumerations are spurious and do not properly arise on the record itself. To answer petitioner's brief without first pointing out the spurious nature of these questions would be to a great extent to engage in shadow boxing on false issues. Hence, we call attention to the following:

On page 4 of the Petition for Certiorari herein, the first question stated is "whether a petition for corporate reorganization under Chapter X, where liquidation and not a readjustment of the rights of creditors was at the very outset the only possibility, which was assailed as to its good

faith by the answer of a creditor was properly approved as filed in good faith," is not properly raised on this record and is a false issue because it is contended by the respondents and found by the court that a reorganization was feasible and was for the best interest of the creditors, and that save the jurisdictional questions raised by these parties the reorganization might have been perfected long ago. (Tr. 60-61.) We do not propose to argue the question as to whether a Petition could properly be approved as filed in good faith where liquidation and not readjustment was at the outset the only possibility since this is not such a case and, therefore, there is no need for attempting to settle here this hypothetical issue.

In the Petition, under question 2, page 4, another false issue is raised as to "whether it was proper to approve an involuntary petition as filed in good faith in the face of an answer contesting good faith without requiring the petitioners to prove the specific facts as required in Sections 130, 131 and 146 of Chapter X." That again is an academic issue for the court found here that these facts had been proved and petitioner, if he wished to test a real issue should have raised the question as to whether there was evidence proving such facts.

The third question on page 4 of the Petition is "whether an involuntary petition for corporate organization under Chapter X was properly approved as filed in good faith when it appeared that the assets of the debtor was less than the amount due on the first mortgage bond issue and that no conceivable plan could be adopted whereby equity owners and other creditors could participate in the reorganization and there was pending a foreclosure proceeding in the State Court for the benefit of the first mortgage bondholders and in the absence of a showing that this proceeding was inadequate to grant the relief." The first part of this question raises possibly a proper issue that might have been

raised on the record, if there had been presented to the court sufficient record to show that no conceivable plan could be adopted as indicated in the stated question. The last part of the question, however, is based on an assumption that there was no showing that this State Court proceeding was inadequate to grant the relief. This is contrary to the finding of the court, as shown by the opinion of the Circuit Court of Appeals. (Tr. 59-66, 60, 61.) It is contrary to the finding of the trial court findings, No. 2 appearing on Tr. page 23 to the effect that the petition complies with the requirements of Chapter X of the Act.

The fourth question presented on page 5 of the Petition for Certiorari is whether the Circuit Court of Appeals was warranted in refusing to postpone the hearing on the appeal from the order approving the petition as filed in good faith when the District Court referred the Plan of Reorganization to a Master in Chancery and stated that "it would reconsider the question of good faith upon the coming in of the report." The balance of this question as it is stated refers to the contents of the Master's Report. The question presented is itself a false issue for the reason that the record does not support the statements in the premise. The court did not state it would reconsider the question of good faith upon the coming in of the report. The court entered a specific and clear cut order finding compliance and good faith. (Tr. 23.) The court did state in the report of the proceedings taken before the Court on March 16, 1945, that although he approved the petition as filed in good faith that if he should find from the evidence on the proposed plan that it was not fair and feasible that then he would not approve the Plan, and that that went back to the question of good faith, and that if he found that there was nothing to reorganize that he would not approve any Plan. (Tr. 18.) The court did not enter the order approving the Petition conditionally or with any understanding to reconsider that

order. Hence, this is a false issue. The question of the duty of the Circuit Court of Appeals to consider or not consider the Master's Report will be dealt with under the Argument.

The fifth question presented on page 5 of the Petition as to the first part thereof states a correct issue and is the only issue properly before this Court on the record in this case, but the last part of the question "or whether the foreclosure proceeding was void and the title acquired thereunder was of no effect, as held in the instant case," is an incorrect statement of the issue. The word "void" should be "voidable" in order to properly state the issue. This issue will be dealt with under Argument.

The specifications of error appearing on pages 15 and 16 of the Brief in support of the Petition for Certiorari herein, three in number, are contractions of the five questions presented on pages 4 and 5 of the Petition which we have commented above and are subject to the same criticism as being false issues. The comment thereon need not be repeated.

C.

ARGUMENT.

Before entering upon detailed rebuttal of petitioner's argument, we wish to point out that the entire argument of the petitioner is based on a false premise and a failure or unwillingness to understand the basis of the opinion of the Circuit Court of Appeals in this case in the following particular.

The entire argument is based on the assumption that the Court of Appeals held that the State Court was without jurisdiction to enter any order of partial foreclosure while the Appeal was pending in this case notwithstanding the fact that there were no restraining orders in effect and no supersedeas had been granted, and the further assumption that the Court of Appeals held that any orders entered by the State Court in the foreclosure proceeding were void. This was not the contention of the Appellants below, nor was it the ruling of the Court of Appeals. The decision of the Court of Appeals is based upon the decision of this Court in *Wayne United Gas Co. v. Owens-Illinois Glass Co.*, 300 U. S. 131, where this Court said:

> "The respondents went forward with the proceedings in the state court, looking to a sale of the debtor's property, with full knowledge that a rehearing might be granted and that the order entered thereon might be appealed. They are not entitled therefore, to rely on any status acquired in the state court suit as precluding further consideration of the petition for reorganization."

In other words, had the ultimate outcome of this case resulted in the sustaining of the order of the District Court

holding that the matter was *res adjudicata*, and that the District Court was without jurisdiction, then the orders of the State Court taken in the interim would have been valid and effective, but inasmuch as that was not the outcome of the proceeding and inasmuch as the action in the State Court was taken by the petitioner herein with full knowledge of the pending action in the Bankruptcy Court, he took such action at his peril and such titles as he procured by the State Court proceeding were procured by an attempted fraud on the jurisdiction of the Bankruptcy Court and are voidable. The question of the jurisdiction of the Superior Court *per se* is not involved in this matter, and his failure or unwillingness to understand that fact has lead the petitioner herein into much argument and citation of much authority to prove points not really in issue. With this explanation, we proceed to reply to the specific arguments of the petitioner.

REPLY TO PETITIONER'S ARGUMENT DIVISION I.

I.

Under his first heading, page 17 of his brief, petitioner herein contends that the interest of the debtor was extinguished by a foreclosure which ripened in to a deed before the order approving the petition as filed in good faith was entered; and in support of this thesis he seizes on a chance remark of the Court of Appeals which the Court itself referred to as a comment (Tr. 62) to the effect that "the undisturbed custody and administration of the assets have been lodged in the District Court ever since the filing of the Petition for reorganization long prior to the Decree of the State Court."

Petitioner challenges the accuracy of this statement and after having refuted it to his satisfaction, proclaims, "The whole foundation of the opinion is therefore without any support in the record."

The prime fallacy is that this was not the "whole foundation" of the opinion, and besides he did not successfully refute the statement. By his own statement (petitioner's brief page 18) he admits that the Federal Court's Trustee was in possession from June 17, 1942 to September 21, 1943. The petition was filed on July 8, 1943, hence, the Federal Court's Trustee must have been in possession at the time of the filing of the petition.

The real basis of the opinion however is that when the order was entered approving the petition as properly filed and in good faith, it related back to the date of the filing and the jurisdiction of the Bankruptcy Court was continuous and uninterrupted from that time until now.

The court said:

> "The filing of the petition is a declaration to the world that the court has taken jurisdiction under the paramount bankruptcy power of the constitution. Upon adjudication or approval, the title of the Bankruptcy Court reverts to the date of filing; that filing date is the line of cleavage between the debtors estate and that of the court, and anyone knowingly acting in contravention of the court's jurisdiction does so at his peril." (Tr. 62-63.)

This is the foundation of the court's decision.

This foundation is grounded on Sections 502, 511, 512, 514, and 515 of Title 11, U. S. C. A. as well as Sections 110 (a) (c) and (d) and Section 110 (e) of the Act which are cited by the Court in support thereof, (Tr. 63), and the application of the rule therein stated by the Court of Appeals has been sustained by this court in *May* v. *Henderson*, 45 S. Ct. 456, 459; in *Gross* v. *Irving Trust Co.*, 53 S. Ct. 605; and *Isaac* v. *Hobbs Tie and Timber Co.*, 51 S. Ct. 270.

PETITIONER'S ARGUMENT, DIVISION I, SUB. PAR. (A).

The next proposition of the petitioner under his subheading (a) (petitioner's brief page 19) is that in the absence of a restraining order or a supersedeas during the pendency of the appeal, the State Court properly completed the foreclosure proceedings. Under this heading, petitioner contends that there was no pending case in the Bankruptcy Court at the time that the foreclosure was completed. He bases that on the fact that on September 13, 1943, the District Court entered an order of dismissal (The order of dismissal was entered on September 14, 1943, but the error is not material here) and according to his contention from the time that the order of dismissal was entered until that order was reversed by the Court of Appeals there was under his theory no pending case in bankruptcy.

This Court has held to precisely the contrary rule. In the case of *Mackenzie* v. *A. Engelhardt & Sons Co.*, 45 S. Ct. 68, this court said on page 69,

"An appeal is a proceeding in the original cause and the suit is pending until the appeal is disposed of,"

and petitioner does not dispute that on October 14, 1943, an appeal was taken and that the appeal was pending from that time until the Court of Appeals acted thereon reversing the order of the District Court and it is not disputed that it was during this period that the partial foreclosure was obtained, and that the supplemental order directing the issuance of a deed to Witter was obtained; nor is it disputed that Witter was party respondent to the appeal, participated therein, and was thereafter petitioner for a Writ of Certiorari to review the order of the Circuit Court of Appeals which reversed the District Court. Therefore, the Court of Appeals is correct both in fact and in law in arriving at the conclusion that the petitioner Witter knew at the time that he proceeded to complete this partial foreclosure without notice to the other parties to the Federal Suit, that in doing so, he was impinging upon and attempting to defeat the jurisdiction of the Bankruptcy Court which vested from the time of the filing of the petition, and that he could prevail only if he were successful in his challenge to the jurisdiction of the Bankruptcy Court on the petition itself. True, the District Court had held itself to be without jurisdiction, but that very question was put in issue by the appeal and was being contested at the very time that the petitioner was completing his partial foreclosure. A restraining order or a supersedeas while they would have barred action by the State Court, would not have gone to the question of the State Court's jurisdiction, but would merely have arrested its proceeding.

The logical conclusion is that the State Court had jurisdiction to act on the subject matter, if its jurisdiction had

not been supplanted by the Bankruptcy Court. Hence, had the ultimate conclusion been that the Bankruptcy Court was without jurisdiction, the action of the State Court would have been valid; but since it was ultimately concluded that the Bankruptcy Court did have jurisdiction from the time of the filing of the Petition, then the action of the State Court became voidable, and the petitioner acted with full knowledge of this and of the possibility that the jurisdiction in the Federal Court would be established and when he did so, he did so at his peril, that such jurisdiction would be established. Hence, the Circuit Court of Appeals was justified in its finding that

> "his persistence was an idle and fruitless attempt to defeat the District Court's jurisdiction and, indeed, an attempted fraud upon the court."

It is the failure of the petitioner herein to distinguish between the character of the State Court's order as being void or voidable which leads him into an erroneous argument. In any event it is not necessary to hold the action of the State Court either void or voidable from a strictly procedural standpoint in order to sustain the decision of the Circuit Court of Appeals because the Circuit Court of Appeals points out that the petitioner having acted at his peril and with full knowledge, he may be compelled to undo by proper conveyance to the Trustee of the Bankruptcy Court whatever he has accomplished by his proceeding in the State Court.

PETITIONER'S ARGUMENT, DIVISION I, SUB. PAR. (B).

The petitioner's next proposition under his sub-heading (b) (page 22-23 petitioner's brief) is that the court failed to notice the distinction between ordinary bankruptcy and the proceeding under Chapter X, and that its decision is a variance with views of other circuits and with its own views in other cases.

Petitioner's argument under this sub-heading that the dismissal of the petition was a negation of any effect accomplished by the filing thereof is answered by this Court in the decision of *Mackenzie* v. *Engelhardt & Sons Co.*, 45 S. Ct. 68, which we have quoted from above to the effect that an appeal is a proceeding and the suit is pending until the appeal is disposed of, and is further answered by this Court in the case of *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, 57 S. Ct. 382, in which this court said where respondents went forward with the proceedings in the State Court, looking to a sale of the debtor's property, with full knowledge that a rehearing might be granted and that the order entered thereon might be appealed. They are

> "not entitled, therefore, to rely on any status acquired in the State Court suit as precluding further consideration of the petition for reorganization."

In that case there was no appeal pending, merely a Motion for Rehearing and that case was not in what petitioner calls ordinary bankruptcy proceeding, but did involve a suit for reorganization under the bankruptcy act.

In this same argument, petitioner relies upon the case of *In the Matter of Ella Tinkoff*, 141 F. (2d) 731, which he contends distinguishes the rule in the *Isaac* v. *Hobbs Tie and Timber Co.* and the case of *Gross* v. *Irving Trust Co.*, which we have referred to above from this case. The fact, however, is that the case cited by the petitioner is no authority whatsoever for his contentions. The distinguishing feature being that in this case, there was ultimately an order approving the petition as properly filed which related the jurisdiction back to the date of the filing of this petition, whereas, in the Tinkoff case, there never had been an adjudication in Bankruptcy or a finding that the petition was properly filed in good faith. Hence, there was no question of vested jurisdiction relating back from such finding to

the time of filing of petition as there is in this case. Petitioner cites only 141 F (2d) 731 as to the Tinkoff case. The facts involved in that case demonstrating the distinctions that we have made are shown in the former appeal in the same matter entitled *In Re The Matter of Ella Tinkoff*, 85 F. (2d) 305. It is necessary to read both decisions in order to obtain all the facts and when that is done, it is clear that that decision is in no wise in conflict with the decision in this case. That case is also distinguished from this case by the fact that the State Court was in possession of the property when the petition in bankruptcy was filed. Whereas, in this case the State Court was not in possession at the time of the filing of the Petition. We do not deem this, however, fundamental. For all that the Tinkoff case holds is that the mere filing did not of itself oust or affect the jurisdiction of the State Court, but that is not to say that the filing when coupled with the approval of the petition as properly filed at a later date did not do so.

PETITIONER'S ARGUMENT, DIVISION I, SUB. PAR. (c).

The petitioner herein under sub-heading c (page 23 petitioner's brief) complains that the opinion of the Circuit Court of Appeals failed to notice the distinction between a foreclosure completed in the absence of a supersedeas and the case where the appeal operated as a supersedeas which he says is distinguished by this court in the cases which were cited by the Court of Appeals.

Petitioner asserts that the *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, 57 S. Ct. 382, 300 U. S. 131, is distinguished from this case by the decision of this Court in *Union Joint Stock Land Bank of Detroit* v. *Byerly*, 60 S. Ct. 773, and attempts to draw the distinction by assertion in the *Wayne* case that there was a supersedeas, and that while, as pointed out in the *Wayne* case the bankruptcy

jurisdiction superseded the State Court jurisdiction it "again attached" upon dismissal of the bankruptcy case, and that the State Court had the right to proceed with the foreclosure and that its procedure "was as if no bankruptcy case had ever existed." The fallacy in this argument is that it rests on a misconstruction of both the *Wayne* case and the *Union Joint Stock Land Bank of Detroit* v. *Byerly* case. In the *Wayne* case, the facts as stated in the opinion of this Court (pages 383 and 384) are that the petition filed in that case was dismissed on March 2, 1936, and a Petition for Appeal presented to the Circuit Court of Appeals on March 20, 1936, was denied on April 15, 1936, because it was filed under the wrong section of the bankruptcy act, and that on April 17, 1936, petitioner served notice that it would on April 24, 1936, pray an order vacating the order of March 2 and for a rehearing and review of all matters involved in the proceedings. This petition was presented and was taken under advisement and on May 12 was granted to the extent of setting aside the order of March 2, and setting the matter for rehearing and review on May 22, on which date a second amended and supplemental petition was filed and objections filed thereto and this petition was dismissed on May 28. On June 11 petition for appeal was granted and at that time a supersedeas was granted. The action in the State Court, however, took place after the order of March 2 dismissing the petition. In that case prior to the filing of the bankruptcy reorganization petition, the property had been in the hands of a State Court receiver and the trustee of the first mortgagee intervened into the receivership and sought the foreclosure and the State Court had ordered a sale and the decree had become final before the petition for reorganization. The remaining action was a conformation of the sale, and this is the action which took place after March 2 at a time when the petition stood as dismissed. In fact the

Circuit Court of Appeals dismissed the petition also in that case and it was only in this court when it reviewed the matter that it was reinstated. The exact date is not shown, but the statement of the Court that the proceedings in the State Court went forward "with full knowledge that a rehearing might be granted and that the order thereon might be appealed" (57 S. Ct. 382, page 384) demonstrates that the action in the State Court relied upon took place after March 2, 1936, and before the granting of the Petition for Rehearing on May 12, 1936. The supersedeas was not granted until June 11, 1936, hence the distinction sought to be drawn by the petitioner in this case is a false distinction. There being no supersedeas in effect in the Wayne case at the time of the State Court's order. In fact, there was not even an appeal pending. There was merely the Petition for Rehearing of an order from which the appeal had already been denied by the Circuit Court of Appeals. Hence the parties proceding in the State Court relied not only on the District Court finding of a lack of jurisdiction but on the conformation thereof by the Circuit Court of Appeals. But this court held that that was not enough to destroy the jurisdiction of the bankruptcy court.

There is nothing in the decision of this court in the *Union Joint Stock Land Bank of Detroit* v. *Byerly* case, 60 S. Ct. 773, which distinguishes the case at bar from the application of the rule in the *Wayne United Gas Co.* case. It is true this court did say that when the proceeding was dismissed in the bankruptcy court that "the termination of the bankruptcy proceeding restored the jurisdiction and power of the State Court, and further said that the State Court's jurisdiction "again attached upon the dismissal of the bankruptcy case." But this language must be considered in connection with what the Court was talking about. That was a case in which the suit had been dismissed on grounds of unconstitutionality of the act under

which it was brought. The Motion to Reinstate was made after the action in the State court entering a decree confirming the sale and after the authorization of and execution of a deed by the sheriff and the recording thereof and the taking of possession by the purchaser, (see 60 S. Ct. 773) and the reinstatement was pursuant to amendment of the laws which took place after the dismissal. Hence, at the time of the State Court action in that case the bankruptcy proceeding stood properly dismissed on constitutional grounds and the reinstated proceeding was one under a newly enacted statute, and this court held that this enactment of that statute did not by its terms reinstate the proceedings but only afforded grounds therefor which came into action only when the parties moved to reinstate it. Hence, as this court properly said on page 777 Supreme Court edition "in the interim, no bankruptcy case was pending and the State Court had jurisdiction to proceed as it did," and this court itself in that opinion distinguished the case from the Wayne case by pointing out on page 777 of the opinion that the action in the Wayne case was taken with notice of the filing of the Petition for Rehearing after the dismissal and that the parties there acted at their peril having that notice. In the case at bar the facts are stronger in favor of the jurisdiction because here there was actually an appeal pending and further the facts in the *Wayne United Gas Co.* case were not nearly so strong as in this case from another standpoint for, in that case the decree had been entered by the State Court before the petition was even filed. Here there was merely a pending proceeding, no decree having been entered. The only decree entered in the Wayne case by the State Court after bankruptcy petition was filed was the decree conforming the commissioners' sale. The decree of sale had already become final before the Petition

was filed. (See 57 S. Ct. 384.) Not only that but the State Court was in possession of and administering the property at the time the petition was filed. Such was not true in this case.

Petitioner herein makes a further contention that the Wayne case is distinguishable on the grounds that no restraining order could have been issued prior to the approval of the petition in that case. We submit that is beside the point because whatever might have been done prior to the approval of the petition, the petition had been dismissed and we submit the contention that the petitioning creditors here could have been expected to obtain a restraining order from the District Court which held itself to be without jurisdiction is a curious type of reasoning. The petitioning creditors might have obtained a supersedeas order from the Appellate Court but to do so it would have been necessary to have filed a supersedeas bond and thereby would have entailed additional expense which was not necessary to constitute a pending case as we have pointed out under the rule of this court. *Mackenzie* v. *A. Engelhardt & Sons Co.* 45 S. Ct. 68, 69.

Further argument of the petitioner herein on page 25 to 28 that the respondents having failed to avail themselves of their right to a restraining order and having failed to inform the State Court of the pendency of the bankruptcy proceeding must abide the consequences of such failure or neglect is another form of arguing that it was necessary to file a *lis pendens* in the State Court proceeding. We wish to point out that under the terms of the bankruptcy act itself the *lis pendens* was not necessary to be filed. Sub-division g, Section 44 Title 11 U. S. C. A. provides the method for filing a *lis pendens* in order to defeat a judicial sale of property when the estate is brought into the bankruptcy court by the filing of a petition therein; and it re-

quires thereunder the filing of a certified copy of the petition with schedules omitted, or of the decree of adjudication, or of the order approving the trustees bond, in the office where conveyances of real property are recorded in the county where the bankrupt owned or had interest in real property. But this very statute provided an exception thereto as follows "provided, however, that this subdivision shall not apply to the county in which is kept the record of the original proceedings under this title" and in this particular case the property was located and the record of the original proceedings were kept all in Cook County in the State of Illinois. Hence, no notice was necessary to the State Court. The pending proceeding was itself sufficient notice. In fact the notice of the pending proceeding was on file two places in Cook County, both in the District Court and in the office of the Clerk of the Seventh Circuit Court of Appeals which office is also in Cook County, Illinois.

We suggest in passing that if there were any merit to the contention that the State Court was not informed of the bankruptcy proceeding, which there is not, then petitioner herein would hardly be in a position to claim the benefit thereof when it was he who carried the proceedings forward in the State Court with full knowledge of the bankruptcy proceedings and without affording any notice to the respondents herein who were parties to the proceedings of his contemplated action in the State Court.

All of the remaining arguments of the petitioner under Division I of his Brief to the extent that they have any direction apply to the question of whether the filing of the petition *per se* ousted the jurisdiction of the State Court, and do not touch on the questions here involved as to whether the approval of the petition relates back to the date of the filing thereof and makes the jurisdiction of the

bankruptcy court continuous from the date of the filing of the Petition and whether a party to the bankruptcy proceeding who knowingly has attempted to defeat that jurisdiction by taking steps, without notice to his opponents, in the State Court, and without informing the State Court of the pending action, can profit by his wrong, or whether he can be required by the bankruptcy court to make restitution of the wrong that he has attempted by surrendering anything he has obtained as a result thereof. Certainly his grantee with knowledge could take no greater interest than the transgressor himself had.

We submit that the decisions of the Circuit Court of Appeals in this case is not at variance with the decisions of this court in any of the cases cited by the petitioner under this division or in any part of his Brief.

Reply to Petitioner's Argument, Division II.

Under his Division II found on page 28 and following pages of his brief herein petitioner contends, as we understand it

1. That where property is valued less than the first mortgage bond issue, there can be no reorganization under Chapter X.

2. That where the petition alleges that a debtor's property should be liquidated for the benefit of one class of creditors, it should not be held to be in good faith.

3. That petitioning creditors must both allege and prove insufficiency of the prior proceedings and need for relief.

With respect to the first of these proposals, the petitioner herein is in error in his premise. Neither *Marine Harbors Properties* v. *Mfgrs. Trust Co.*, 63 S. Ct. 93 cited by petitioner, nor any other case that we have found holds as a postulate that there can be no reorganization where the

debtor's property is of less value than a first mortgage bond issue. The cases cited merely hold that to be an element for consideration by the Court in determining the issue of good faith. To hold that there could be no reorganization under those circumstances under Chapter X would be to nullify the provisions of Sub-chapter 10 of Chapter X, (Section 616, Title 11, U. S. C. A.), under sub-paragraph 8 thereof where the statute in dealing with the rights of stockholders provides for their protection but adds this "provided, however, that such protection shall not be required if the judge shall determine that the debtor is insolvent."

The question of insolvency itself is one of the issues to be determined in the case and is not wholly determinative of jurisdiction but goes to the kind of plan that may be effected. And in any event there is no record before this court on that question nor is there any record which shows that only one class of creditors are to be dealt with. Such record as there is, indicates that on the proposal of petitioning creditors, those having priority by law such as taxes as well as the first mortgage bondholders and Witter who held a judgment or a decree on a subordinated first mortgage bond are to be dealt with. Also the record indicates that the stockholders claim an interest in monies on hand (Tr. 17-18) and have litigation pending in the State Court on that matter. What if any provisions a feasible plan will make for any or all of these groups is not now before the court. It is true that the petitioning creditors propose that nothing be allowed to claimants junior to the first mortgage bondholders. Whether a plan to be submitted would follow that suggestion is to be determined within the discretion of the Court. If the stockholders had no interest because of insolvency, a plan not only could be, but would have to be submitted which would eliminate

them as parties in interest. *Case et al.*, v. *Los Angeles Lumber Products Co., Limited*, 308 U. S. 106, 60 S. Ct. 1, *Consolidated Rock Products Co.* v. *Du Bois*, 312 U. S. 510, 61 S. Ct. 675.

The second proposal of the petitioner herein under subheading No. 2 is an academic issue, the merits of which need not be determined. The original petition herein did not allege that the property should be liquidated at all, but merely asserted that liquidation of the assets was the only alternative to reorganization under Chapter X and suggested a plan for giving stock to the first mortgage bondholders and that nothing of value be given to the parties having interest junior to the first mortgage bondholders, but also suggested that the business be carried on under corporate structure and that the value of the assets be preserved by avoiding liquidation, all of which appears in the petition on pages 20 and 21 of the Transcript filed in this court in case No. 404, but no where appears in the record herein. Nor does the petition at all appear in the record herein. Evidently, the petitioner herein did not think enough of his point to bring up the petition he now attacks.

The petitioners' third point has several answers. We believe a sufficient one is that the original petition did allege the inadequacy of the prior proceeding to preserve the values of the estate herein involved and did allege the need for relief. There could be no reorganization in the foreclosure proceeding which would not necessitate either a unity of bondholders in their action or a liquidation of the interest of some bondholders to the advantage of other bondholders who acted together to bid at a liquidation sale. True, the State Court might offer the minority bondholders an opportunity to participate in a plan which the majority formulated. On the other hand in this proceed-

ing the entire group of bondholders would be controlled by the two-thirds majority provided by statute in favor of any plan which the Court found to be fair, equitable and feasible. It was to preserve the going concern value and continued operation value of the property rather than to effect a liquidation that this petition was filed. Findings of the facts alleged and proved are set forth in considerable detail in the Opinion of the Circuit Court of Appeals (Tr. 60-61). These findings, petitioner seeks to overcome by assertion and argument, but did not bring the record before this Court on which these findings are grounded. He seeks to have this Court assume that there was no evidence before the District Court, but he has tendered no certificate that the record he presented contains all the evidence below. For this purpose he cannot rely upon the approval of the transcript as to accuracy (Tr. 19) for that report covers only the proceedings of the day indicated, nor can he rely on the clerk's certificate (Tr. 38) for this certifies only as to matters called for by his designation of records. On the contrary it is shown by the opinion of the Court of Appeals that evidence was offered at the original hearings on the original petition which was still before the Court when the order here complained of was entered and that that evidence was reoffered. (Tr. 60.)

Petitioner ignores the fact that prior to the former appeal, evidence was heard on the original petition and the answers filed thereto as well as his Motion to Dismiss and that the complete record was presented to the Circuit Court of Appeals in case No. 8472, and that after a full consideration and a denial of certiorari by this Court in case No. 404, a Mandate issued directing a reorganization and that these same points were raised in the answers which were before the Court of Appeals and were concluded by the Mandate. Section 545, Title 11, U. S. C. A. provides that

when "any issue raised in an answer filed under Section 536 or 537 of this title has, * * * already been tried and finally determined under the provisions of section 543 or 544 of this title, such final determination shall be conclusive for all purposes under this chapter."

Your petitioner herein who had participated in those hearings when he filed his answer raised precisely the same questions that had been heard already except his issue as to the completion of the partial foreclosure. This was the only new question. This Court does not have before it in this cause the transcript of the oral testimony taken on the original hearings, but the District Court had it, and the Court of Appeals had the record of it.

The petitioner incorrectly asserts on page 36 of his brief that no evidence was offered in support of the petition "except that the petitioning creditors attached to their brief the record on the previous appeal." The record does show that the document to which he refers was offered in open court and received in evidence as petitioners' exhibit 1 (Tr. 13) but it was not brought up nor was Witters' Exhibit B which was also admitted (Tr. 13) nor was exhibits 1, 1a, 1b, and 1c which were exhibits offered in the earlier hearing and excused from printing in case No. 8472 in the Circuit Court of Appeals but which were brought up before that court in the case below (See Tr. 70 for assertion by petitioner herein to that effect.) They do not appear to be before this court in any record, but the court below said in its supplemental opinion that it had examined these unprinted exhibits "and find that they substantiate fully the conclusions we reached." (Tr. 95.) How can this court say they do not when they are not before this Court? Where errors are assigned that depend upon the construction of evidence or instruments that do not appear in the record, the judgment of the court below

will be affirmed. *Red River Cattle Co. of Texas* v. *Sully,* 144 U. S. 209, 12 S. Ct. 809. It is true that the burden was on the petitioning creditors to plead and prove their need for relief, but when they did that and the Trial Court found their need for relief, it was then presumed that the findings were correct and then the burden is on the parties contesting those findings to overcome this presumption. *Le Blanc* v. *Fidelity Trust Company,* 65 F. 2d 442 (C. C. A. 1), *Bassett* v. *Claude Neon Federal Company of Kansas,* 65 F. 2d 526 (C. C. A. 10) *Hunter* v. *Commerce Trust Company,* 55 F. 2d 1, 4 (C. C. A. 8) and this must be overcome by showing that the trial court was wrong. The petitioning creditors showed by the evidence below that this was the only proceeding in which all the issues could be settled and that it was more expeditious. All of those matters and all of that evidence was considered by the Circuit Court of Appeals in case No. 8472 when the court said in that case that "considering all the evidence * * * we conclude that the Peer Manor Building Corporation, after its dissolution, as the evidence shows it was conducted, was an unincorporated company or association, and as such *was properly subject to reorganization under said Chapter X*" (143 F. 2d 769, 772), and the court on that record issued its Mandate to the District Court with "directions to proceed with the reorganization of debtor." (Tr. 4.) All of these issues having been concluded in the former appeal, Witter placed before the court merely one new issue that of the effect of the partial foreclosure.

On page 38 of his brief, petitioner herein contends that no opportunity was given to try the facts as to good faith, and that that was referred to the Master. The Court did tell the petitioner herein that he could present to the Master certain matters of proof that he was offering. That, as we take it, was on the Court's theory that good

faith must continue throughout the case, and that if he could show evidence before the Master that would show that good faith no longer existed then the Court would have to consider that on whether to continue to proceed with the reorganization and act upon a plan. What the Court meant by that is illustrated by his remark appearing on page 18 of the record that "if I find after the hearing and the evidence, that it is not fair and feasible, then, of course, I would not approve the plan, and that goes right back to the question of good faith." The fact that the Court entered this order appearing on pages 22 to 30 of the Transcript of the Record is conclusive that the Court did approve the petition as filed in good faith and did not refer that question to the master. In the case below the petitioner herein did file in the Clerk's Office of the Court of Appeals a document purporting to be a Master's Report rendered the 3rd day of January, 1946, which is included in the Transcript of the Record on pages 46-56; and there was filed a paper denominated a Motion to Postpone Oral Argument and the consideration and disposition of this cause until after the District Court judge should have determined the cause upon its merits (Tr. 44) and in support of that alleged motion there was filed a paper called Suggestions in Support of Motion to Postpone Determination of this Appeal, and the copy of the alleged Master's Report was attached to these suggestions which appear on Transcript pages 45 and 46. The Clerk certified that these papers were filed in his office, but the motion itself is not signed by any counsel and the suggestions are not signed by any one. They contain a form of verification but no verification. So from a procedural standpoint, there was no Motion before the Court and no suggestions sponsored by any one. These papers were filed in the Clerk's office on January 26, 1946, whereas the order appealed from was entered

on March 16, 1945, and the Master's Report purported to have been made on January 3, 1946 (Tr. 56). Certainly, a Master's Report filed more than 9 months after the entry of an order, could be no grounds for reversing or sustaining that order, it not having been in existence at the time of the entry of the order, nor is it any part of the record in this proceeding. No leave of Court was ever obtained to file it, and Petitioner herein complains on page 38 of his Brief that the Circuit Court of Appeals entirely ignored this report. We submit that there is nothing else that the Circuit Court of Appeals could have done without committing error, other than to ignore the report.

Further, we wish to point out that the Master was wholly without jurisdiction as to any matter involved in this appeal. (*Newton* v. *Consolidated Gas Co. of N. Y.*, 42 S. Ct. 264.) The Master's Report recites that it was made on a stipulation of the parties which is not shown in the record and while these respondents admit that they entered into a stipulation with respect to the taking of testimony before the Master, they made no stipulations of such purport as the Master's Report indicates in his opening statement and the Master was without any jurisdiction to act upon any matter that was involved in this appeal. The District Court, once having entered its order, and that order having been appealed from, it lost jurisdiction to change the order. We respectfully submit that this Court should properly do what the Circuit Court of Appeals did, that is entirely ignore the alleged Master's Report. In any event the Master's Report does nothing other than take an opposite view to that taken by the Circuit Court of Appeals. Hence, it serves no other purpose than that of and additional brief and argument for petitioner. The contention of the petitioner that he had had no opportunity to offer his proof until the matter reached the Master is

without merit. There was before the District Court Witter's Exhibit A which showed the completion of the partial foreclosure in the State Court, showed that a deed had issued, and there was no dispute of this fact. Hence, no necessity existed to take testimony before the Master to establish this fact. The Master's conclusions from this fact are merely conclusions and carry no additional weight.

Reply to Petitioner's Argument, Division III.

Under his division III petitioner herein advances the theory that jurisdiction in the absence of a restraining order and a supersedeas on appeal attached from the date of the approval of the petition and not from the filing date. He cites no authority which sustains this view. Apparently he relies upon a theory of convenience in this case that to permit jurisdiction to attach from the date of the filing of the petition is inconsistent with the provisions of the Bankruptcy Act and hence, does not apply under Chapter X. On that he argues that all the provision of Chapter X with respect to application of the other sections of the Bankruptcy Act attaching jurisdiction and conferring title on trustees are controlled by the provision of Section 511, Title 11, U. S. C. A. which contains the words "where not inconsistent with the provisions of the Act" and that this demonstrates that it was not the intent of Congress to permit the approval of a Petition to affect pending foreclosure proceedings unless a temporary restraining order was issued. If that had been true, Congress would not have permitted Section 110a Title 11, U. S. C. A. to include petitions proposing arrangements and plans as well as petitions in Bankruptcy. This section reads in part:

> "The Trustee of the estate of a bankduptcy and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by

> operation of law with the title of the bankrupt as of the date of the filing of the petition in bankruptcy or *of the original petition proposing an arrangement or plan under* this title." (Italics ours.)

and in the same section further on, it reads:

> "The title of the trustee shall not be affected by the prior possession of a receiver or other officer of any court."

Hence, it is clear that there is no foundation whatever to this theory of convenience which petitioner herein has formulated for this case. The authorities (statutory, and court decisions), which make it clear that the jurisdiction of the court upon the approval of the petition relates back to the date of the filing thereof have been cited earlier in this brief and need not be here repeated.

D.

Conclusion.

From an analysis of the record in this case, we conclude:

1. That the various questions other than the question of the effect of the partial foreclosure involved herein are raised in this Court without a record upon which the Court can determine the validity of the objections to the order below.

2. That if the Court may consider the records in the two previous appeals as requested by the petitioner herein, the record is still deficient in that it does not contain all the exhibits submitted to the District Court and before the Circuit Court of Appeals in this proceeding below.

3. That upon a consideration of either the record actually before this Court or of the entire record which was before the Circuit Court of Appeals, the opinion of the Circuit Court of Appeals is sustained.

4. That with respect to the partial foreclosure, the facts relative to it are not in dispute and hence are properly before this Court. The partial foreclosure did not and could not oust the jurisdiction of the bankruptcy court for that

(a) The property of the debtor was in the possession and custody of an officer of the bankruptcy court at the time of the filing of the original petition herein.

(b) The petitioner herein was a party to the proceeding in the bankruptcy court throughout.

(c) The decree of partial foreclosure and the decree confirming the issuance of a deed to Witter in the partial foreclosure proceeding were sought and entered while this bankruptcy proceeding was pending on appeal in the Circuit Court of Appeals with full knowledge of Witter, who was the moving party in the foreclosure proceeding and who took this action without notice to the petitioning creditors in this proceeding.

(d) The action of Witter in attempting to thus oust jurisdiction of the bankruptcy court was a fraud on both courts.

(e) Any action of the State Court taken during the pendency of the Appeal was subject to the superior jurisdiction of the bankruptcy court, and hence, became voidable upon it having been established that the bankruptcy court did have jurisdiction.

(f) The property of the debtor, the office in which the record of titles is kept, and the office where the record of this bankruptcy proceedings were kept were all in Cook County, State of Illinois, and hence no *lis pendens* notice was necessary to prevent an alienation of this property from jurisdiction of the bankruptcy court by any judicial sale.

(g) The petitioner herein Witter, having brought about

a proceeding in the State Court with full knowledge of, and while he was a party to, the pending proceeding in the bankruptcy court can be compelled by the bankruptcy court to make restitution and he or his nominee Willens can be required by the bankruptcy court to make such reconveyance as to reinstate the title (free from any cloud) in the bankruptcy trustee, if such action is necessary to clear the title to the real estate from any cloud.

For the foregoing reasons, we conclude that the petition for certiorari ought to be denied at the cost of petitioner.

Respectfully submitted,

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